No. 88-813

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

THE CINCINNATI POST, a division of SCRIPPS HOWARD, INC.,

and

DAYTON NEWSPAPERS, INC.,

and

THE DISPATCH PRINTING COMPANY,
Petitioners,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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I.

QUESTIONS PRESENTED

1. Whether the First Amendment right of public access to judicial proceedings applies to civil proceedings.

2. Whether trial judges have unlimited discretion to use secret courtroom proceedings and permanent gag orders to resolve civil cases before trial, without regard to the First Amendment rights of the press and the public.

II.

LIST OF PARTIES

This petition arises from *Cincinnati Gas & Electric Co., et al. v. General Electric Co., et al.*, an action in which the petitioners sought to intervene. The plaintiffs in that action were the Cincinnati Gas & Electric Company, the Columbus and Southern Ohio Electric Company, and the Dayton Power & Light Company. The defendants were the General Electric Company and Sargent & Lundy.

Petitioners The Cincinnati Post, a division of Scripps Howard, Inc.; Dayton Newspapers, Inc. d/b/a The Dayton Daily News; and the Dispatch Printing Company d/b/a The Columbus Dispatch moved to intervene in the underlying action for the limited purpose of challenging district court orders on First Amendment grounds. The General Electric Company opposed that motion, which was denied, and Petitioners appealed to the court of appeals as non-party appellants. Only the General Electric Company filed a brief on the merits and appeared at oral argument as an appellee in the court of appeals. The plaintiffs in the district court and Sargent & Lundy filed no briefs in the court of appeals and did not appear at oral argument. Consequently, the plaintiffs and Sargent & Lundy are not named in this petition as parties.

The petitioners before this Court are The Cincinnati Post, a division of Scripps Howard, Inc., Dayton Newspapers, Inc. and the Dispatch Printing Company.[1] The sole respondent before this Court is the General Electric Company.

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[1] *Rule 28.1 Listing.* Petitioner The Cincinnati Post has one publicly-owned parent company: The E. W. Scripps Company. Petitioner has no other publicly-owned parent companies, affiliates or subsidiaries. The other petitioners have no publicly-owned parent companies, affiliates, or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on August 18, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 854 F.2d 900, and is reprinted in the appendix hereto, p. A1, *infra*. Two of the orders of the United States District Court for the Southern District of Ohio from which Petitioners appealed are reported at 117 F.R.D. 597. The other order from which Petitioners appealed is not reported. All are reprinted in the appendix hereto, pp. A13, A25 and A32.

JURISDICTION

The parties to the underlying action invoked the jurisdiction of the United States District Court for the Southern District of Ohio based on diversity of citizenship, 28 U.S.C. §1332. Petitioners herein invoked that court's federal question jurisdiction pursuant to 28 U.S.C. §1331.

On September 14, 1987, October 5, 1987, and November 20, 1987, the district court entered orders denying the relief sought by Petitioners. See pp. A13, A25 and A32, *infra*. Following Petitioners' appeal of those orders, the Sixth Circuit entered a judgment and an opinion on August 18, 1988, affirming the orders of the district court.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

STATEMENT OF THE CASE

I. The Nature Of The Issues Presented By This Petition.

This petition presents important issues of federal constitutional law which have not been, but should be, decided by this Court and which were decided by the courts below in conflict with applicable First Amendment principles announced by this Court.

Petitioners publish major daily newspapers circulated primarily in the Cincinnati, Dayton and Columbus, Ohio metropolitan areas. They seek to overturn federal district court orders requiring the total and permanent secrecy of a civil courtroom proceeding known as a summary jury trial. Those orders permanently prohibit ordinary citizens compelled to serve as federal jurors in the proceeding from revealing anything about what transpired. An identical life-long gag order applies to the parties and their counsel. The transcript is sealed permanently. The jury list is sealed permanently. The federal courtroom was closed to the press and the public, with guards posted outside, for the entire two week proceeding.

The secret summary jury trial led to the disposition of civil litigation that attracted national attention because it raised issues about the safety of components of nuclear power plants. In upholding the district court's secrecy orders in all respects, the court of appeals ruled that "the first amendment ... does not attach to summary jury trial proceedings" and that any "public 'right to know' has no validity with regard to summary jury trials." 854 F.2d 900, 903, 905, Appendix A6, A11.

In summary jury trials, the jury renders an advisory verdict based on formal, but condensed presentations of evidence. Federal and state courts across the country use summary jury trials to induce parties to resolve their disputes without the time and expense of full trials. As courts increasingly turn to such expedient means of clearing their congested dockets, this petition presents the important question of whether the desire to dispose of civil cases without lengthy trials justifies unfettered judicial discretion to close courtrooms, seal transcripts, and impose permanent gag orders upon ordinary citizens. What is most troublesome and telling about the court of appeals' opinion is that it uses a superficial label, "settlement technique," to dispose of the important and difficult constitutional questions posed by this case. The court of appeals did not uphold the district court orders by balancing Petitioners' First Amendment interests against the asserted desire for secrecy, but declared instead that the First Amendment does not apply at all.

II. The Nature Of Summary Jury Trials.

Summary jury trials require litigants to present summaries of their evidence in the trial courtroom to a federal or state jury under the supervision of the trial judge. The jury's verdict is supposed to be a reliable predictor of the outcome of a full trial, thus prompting the parties to dispose of their case through subsequent settlement talks rather than through a full trial. *E.g., Fraley v. Lake Winnepesaukah, Inc.*, 631 F. Supp. 160, 163 (N.D. Ga. 1986); *see generally* Lambros and Shunk, *The Summary Jury Trial*, 29 Cleve. St. L. Rev. 43 (1980); Lambros, *The Judge's Role In Fostering Voluntary Settlements*, 29 Vill. L. Rev. 1363 (1984).

Summary jury trials are nonbinding unless the parties agree otherwise. Some courts have urged parties to dispose of their cases by stipulating that the summary

jury verdict would finally determine the merits. Such a stipulation could be entered at any time after, during, or before the proceeding. One court stated:

> The parties should consider the possibility of consenting to a binding summary jury trial. This would obviate the need for a formal jury trial while providing a just, expedient, and inexpensive means of resolving this dispute.

Negin v. City of Mentor, 601 F. Supp. 1502, 1505 (N.D. Ohio 1985); *see Strandell v. Jackson County*, 115 F.R.D. 333, 334 (S.D. Ill. 1987), *rev'd*, 838 F.2d 884 (7th Cir. 1988); Spiegel, *Summary Jury Trials*, 54 U. Cin. L. Rev. 829, 831 (1986).

Authorities on summary jury trials emphasize that the procedure must simulate a traditional trial so that the summary verdict will predict reliably the outcome of a traditional trial. Thus, the parties are supposed to shape their summary jury trial presentations "to parallel most closely the presentation they expect to make at the time of trial." Lambros, *The Summary Jury Trial—An Alternative Method Of Resolving Disputes*, Judicature at 287 (Feb. 1986). In pursuit of that objective, "[i]t is essential that a person of authority conduct the proceeding, in a courtroom, in order to maintain the aura of actual trial." Lambros, *The Summary Jury Trial And Other Alternative Methods Of Dispute Resolution*, 103 F.R.D. 461, 470 (1984).

Despite its ultimate objective of achieving settlement before trial, settlement is not negotiated or even discussed during summary jury trials. "[I]t is not a technique to obviate the need for old-fashioned settlement talks." Lambros & Shunk, 29 Cleve. St. L. Rev. at 48.

Pursuant to the Jury Selection and Service Act, 28 U.S.C. §§1861-1877, the court compels ordinary citizens to sit as a jury venire at public expense. Through *voir dire* and the exercise of peremptory challenges, the parties choose six of those citizens to sit as the summary jury. Lambros & Shunk, 29 Cleve. St. L. Rev. at 47 ("The jury panel is drawn from the pool in the same manner as is a regular petit jury"). Many courts do not inform the jurors that their verdict is nonbinding unless the parties agree to be bound. *See, e.g.*, Brenneman and Wesoloski, *Blueprint For A Summary Jury Trial*, Michigan Bar Journal 890 (Sept. 1986).

Counsel present formal opening arguments to the jury in the trial courtroom with the judge presiding. Some courts allow live witness testimony. *Strandell*, 115 F.R.D. at 334; Levin and Golash, *Alternative Dispute Resolution In Federal District Courts*, 37 U. Fla. L. Rev. 29, 38 (1985). Other courts require counsel to describe the anticipated testimony of trial witnesses in lieu of live witness testimony. *E.g., Fraley*, 631 F. Supp. at 164. Physical evidence may be submitted to the jury. However, in furtherance of the procedure's goal of realistically predicting the outcome of a full trial, "counsel are limited to representations as to evidence that would be admissible at trial." *Fraley*, 631 F. Supp. at 164.

Following formal closing arguments, the judge charges the jury after reviewing proposed jury instructions submitted by the parties. The jury then deliberates and returns with a verdict. Later, the judge conducts a conference in-chambers to discuss settlement, using the summary jury's verdict as a basis upon which the case can be resolved. Lambros, Judicature at 290.

Although the Seventh Circuit has ruled that courts cannot compel the parties to participate in summary jury trials, courts outside that circuit assert the authority to compel and do compel parties to engage in summary jury trials. *Compare McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988) *and* Lambros, Judicature at 287 *with Strandell*, 838 F.2d 884.

Since United States District Judge Thomas D. Lambros of the Northern District of Ohio introduced the procedure in 1980, courts across the country have adopted it. Summary jury trials are used by at least 65 federal courts sitting in Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and West Virginia.[2]

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[2] *See* Marcotte, *Summary Jury Trials Touted*, A.B.A. J. 27 (April 1, 1987); Annual Judicial Conf., Second Judicial Circuit Of The United States, 115 F.R.D. 349, 369 (1986) ("Jud. Conf., Second Cir."); The Summary Jury Trial, The Judicial Conf. Of The Sixth Circuit Of The United States at 14-19 (May 16, 1985) ("Sixth Cir. Jud. Conf."); *see also McKay*, 120 F.R.D. 43 (E.D. Ky.); *Arabian American Oil Co. v. Scarfone*, 685 F. Supp. 1220, 1221 (M.D. Fla. 1988); *Jones-Hailey v. Corp. of TVA*, 660 F. Supp. 551, 553 (E.D. Tenn. 1987); *King v. E.F. Hutton & Co., Inc.*, 117 F.R.D. 2, 11 n.14 (D.D.C. 1987); *Strandell*, 115 F.R.D. 333 (S.D. Ill.); *Fraley*, 631 F. Supp. at 163-64 (N.D. Ga.); *Hall v. Ashland Oil Co.*, 625 F. Supp. 1515, 1523 (D. Conn. 1986); *Watts v. Des Moines Register*, Civ. No. 85-757-A (S.D. Iowa Aug. 1, 1986); *Stacey v. Bangor Punta Corp.*, 107 F.R.D. 779, 782 (D. Maine 1985); *Negin*, 601 F. Supp. 1502, 1505 (N.D. Ohio 1985); *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1372 (D. Minn. 1985); *see Seck v. Hamrang*, 657 F. Supp. 1074, 1076 (S.D.N.Y. 1987).

Many federal courts conduct summary jury trials pursuant to local rules expressly authorizing the procedure.[3] The Judicial Conference of the United States has encouraged its use, as did Chief Justice Burger. Lambros, 29 Vill. L. Rev. at 1378 n.45; Burger, 1984 Year-End Report On The Judiciary 15-16. Texas, Minnesota, and North Carolina are among the state court systems that have adopted the procedure.[4]

III. The Summary Jury Trial In This Case.

Three public utilities ("the Utilities"), which own a nuclear power plant in southern Ohio, brought the underlying action that gave rise to this petition. They sued the General Electric Company ("GE") in the United States District Court sitting in Cincinnati, alleging that GE had sold them a nuclear reactor containment system knowing that it was incapable "of meeting all regulatory requirements and operating in a safe manner." (Amended Complaint ¶s 44, 67.)

On June 26, 1987, the district court ordered the parties to participate in a summary jury trial scheduled to begin on September 8, 1987. The order required the proceeding to be conducted in secret, stating:

> The proceeding, and all results thereof, shall be confidential, and shall not be disclosed other than to the parties, their attorneys, consultants and insurers. The jurors shall be appropriately instructed as to such confidential treatments.

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[3] *E.g.*, C.D. Ill. R. 17(E); N.D. Ind. R. 32; S.D. Ind. R. 33; E.D. Ky. R. 23; W.D. Ky. R. 23; W.D. Mich. R. 44; D. Mont. Standing Order No. 6A; D. Nev. R. 185; N.D. Ohio R. 17.02; N.D. Okla. R. 17.1; W.D. Okla. R. 17; M.D. Tenn. R. 602.

[4] Tex. Civ. Prac. & Remedies Code §154.027 (1987); *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 214 (Minn. 1985); *see* 1 Alternative Dispute Res. Rep. 181-183 (1987).

The order also provided that "[c]ounsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits and that judgment be entered thereon by the Court." (Order, 6/26/87, ¶20.)

A few days later, on July 1, 1987, GE moved to vacate the order, arguing that "where one party strongly opposes being forced to participate in the summary jury trial and does not believe it will serve as a reasonable predictor of the likely outcome at trial, the summary jury trial is doomed to failure." (GE Memor. In Support Of Motion To Vacate Summary Jury Trial, 7/1/87, at 14.) On August 10, 1987, the district court denied GE's motion and decided to proceed with the summary jury trial as originally ordered. The court affirmed its intent to enforce the provision of the original order requiring secrecy.[5] (Order, 8/10/87, at 3.)

Asserting the First Amendment right of public access to judicial proceedings, Petitioners moved on September 4, 1987 to intervene in the underlying action for the limited purpose of challenging the court's confidentiality order and the accompanying closure of the trial courtroom. The Utilities responded by stating that they, too, favored opening the proceeding. One of the defendants, Sargent and Lundy, took no position. Only GE opposed the motion.

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[5] The court of appeals erroneously concluded that the district court did not compel GE to participate in the summary jury trial, surmising that "[a]lthough the court denied [the] motion to vacate the order setting the summary jury trial, it accommodated [GE's] concerns to keep the proceeding confidential, thereby making it unnecessary for [GE] to challenge the court's denial of the motion." 854 F.2d at 904-05 n.5, Appendix A9. The court of appeals overlooked the fact that the very order that GE had moved to vacate *already contained* the confidentiality requirement. The district court took no additional steps to accommodate GE when the court denied GE's motion to vacate.

The summary jury trial was the first opportunity for the parties to present evidence and argument in the courtroom since the case had been filed over three years earlier in July, 1984. In an in-chambers conference with the parties immediately prior to the start of the proceeding, the court suggested opening the proceeding to the press and the public. Counsel for GE responded that "we just can't agree to that" because there is "[t]oo much at stake in terms of potential injury to our shareholders and our reputation and so forth."[8] (Transcript Of In-Chambers Conf., 9/8/87, at 3.)

Immediately following that conference, the summary jury trial commenced in the trial courtroom in closed session with guards posted outside. On September 14, 1987, after the summary jury trial had been under way for five days, the court denied Petitioners' motion to intervene, ruling that the First Amendment right of public access does not apply to summary jury trials. 117 F.R.D. 597, Appendix A13.

To support its ruling, the court vacated that portion of the challenged order providing that the parties could stipulate that the proceeding would finally determine the merits. That decision resulted from the following dialogue during the in-chambers conference of September 8 from which Petitioners' counsel was excluded:

> THE COURT: All right. Now one of the things [the Newspapers] . . . have seized upon . . . [is the provision that], if the parties agree, the jury verdict can be binding on the parties.
>
> The parties have any ideas about dropping that . . . provision of the Order. . . .
>
> MR. HOFF [GE]: [W]e could drop it from the Order because if the parties decide it is binding,

[8] GE has never claimed that the summary jury trial should be kept secret to protect against disclosure of trade secrets.

> they could do that otherwise, regardless of what the Order said.

(Transcript Of In-Chambers Conf., 9/8/87, 3-4.)

The summary jury trial ended on September 21, 1987, fourteen days after it had begun. Petitioners sought to interview the jurors after the proceeding had ended, but discovered that the jury list was sealed. Then, Petitioners learned through a law clerk that the court had issued a gag order to the jury, but the order was unavailable because the transcript of the entire proceeding was sealed.[7] Neither the gag order nor the order sealing the jury list appeared on the court docket.

In response to a motion by Petitioners, the court released that portion of the transcript containing the gag order. The order stated:

> [S]ince it is within my authority to order you not to discuss this case or your verdict . . . I order that you not discuss it with anyone when you leave this courtroom.
>
> . . . .
>
> And if this case does not settle and a jury verdict is rendered in this case on the merits, you'll be free then to discuss what occurred in these past few weeks.

(Order Amending Order Denying Motion To Intervene, 10/5/87, Excerpts From Transcript Of Summary Jury Trial at 4, Appendix A30, A31.)

On November 20, 1987, about two months after the conclusion of the summary jury trial, the parties announced that they had agreed to a settlement. Despite its previous concern about public knowledge of the outcome of the summary jury trial, GE published a press

[7] Petitioners had informed the district court on September 8, 1987, of their desire to interview the jurors when the summary jury trial was over. They asked the court not to prohibit the jurors from speaking to the press about the proceeding.

release announcing that "a federal jury unanimously found GE not liable on any of the claims brought by the utilities." The press release announced the basic terms of the settlement, including dollar amounts.

That same day, the district court issued an order approving of the parties' settlement and dismissing the action with prejudice. The court based its approval of the settlement on the presentations made at the summary jury trial. The court stated:

> As a result of the summary jury trial, the Court has itself had an opportunity to hear the parties' cases and to evaluate the jury's verdict. The summary jury's verdict was supported by the evidence.
>
> . . . .
>
> Given the jury's verdict, the plaintiffs were justified in agreeing to the terms stated in the settlement agreement.

(Order, 11/20/87, 2, 3, Appendix A34.)

The court released only the specific findings of the summary jury.[8] The court continued the gag orders and the orders sealing the transcript and the jury list, ruling that "all other Orders in this case concerning the confidentiality of documents and the summary jury trial remain in effect." (Order, 11/20/87, 1-2, Appendix A33.) The court of appeals affirmed, but Senior Circuit Judge George Edwards dissented, writing that "I cannot reconcile complete suppression of this record with the First Amendment." 854 F.2d at 905, Appendix A12.

[8] An example of those findings is reproduced below:

> 1. Do you find that defendant General Electric committed fraud against plaintiffs, the elements of which are contained in instructions on page 16?
>
> Yes _____ No [X]

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents Important Issues Of Federal Constitutional Law Which Have Not Been, But Should Be, Decided By This Court.

Summary jury trials use the public courtroom, the power and resources of the judiciary, and the time-honored, democratic institution of a jury to resolve civil disputes. Although they do not involve adjudications unless the parties so agree, summary jury trials are designed to be the final and most decisive step in civil litigation. In holding that the First Amendment does not apply to summary jury trials, the courts below assert the unqualified prerogative to use secret courtroom proceedings and life-long gag orders to bring about the disposition of civil cases before trial.

Accordingly, this case presents this Court with the occasion to determine whether trial judges enjoy the unrestrained power to close the public courtroom, seal the record, and issue permanent gag orders in civil proceedings[9] or, conversely, whether the First Amendment right of public access serves to restrain such an exercise of judicial power. Indeed, since recognizing the First Amendment right of access to judicial proceedings, this Court has yet to resolve the important issue of whether that right applies in civil cases.[10]

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[9] The Federal Rules of Civil Procedure require judges to conduct full civil trials in open court, Fed. R. Civ. P. 77(b), but the rules impose no such constraint on the conduct of any other civil proceedings.

[10] Certain members of this Court and lower courts have stated that the First Amendment right of access applies to civil proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, *J.*, joined by Marshall, *J.*, concurring) and 599 (1980) (Stewart, *J.*, concurring); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984), *cert. denied*, 472 U.S.

(Footnote continued on following page.)

Furthermore, in raising the issue of whether the First Amendment applies to summary jury trials, this case presents an important opportunity to instruct federal and state judges as to the extent that they must consider the public's First Amendment rights in fashioning means of resolving litigation without trial. As courts employ alternative dispute resolution procedures with increasing frequency, this Court should decide now whether the need to increase the speed and efficiency of the civil justice system justifies closing courtrooms, sealing transcripts, and imposing permanent gag orders upon ordinary citizens. For those reasons alone, this case merits this Court's review.

II. The Decision Below Conflicts With Applicable First Amendment Principles Announced By This Court.

This Court has ruled that the First Amendment affords the press and the public a right to observe judicial proceedings. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Court first recognized the right of access to judicial proceedings, applying it to limit the discretion of trial judges to close criminal trials.

From the initial landmark decision in *Richmond Newspapers*, the Court has gradually expanded application of the right. In 1982, the Court struck down a state law mandating closure of a trial during the testimony of a minor rape victim. *Globe Newspaper Co.*

(Footnote continued from preceding page.)

1017 (1985); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *see also Richmond Newspapers, Inc.*, 448 U.S. at 584 (Stevens, J., concurring) (the First Amendment right of access is the right to be free from arbitrary denial of public access to "information about the operation of their government").

v. Superior Court, 457 U.S. 596 (1982). Then, in 1984, the Court refused to dignify misguided notions of efficient judicial administration, holding that the closure of jury *voir dire* violated the First Amendment. *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501 (1984). Most recently, the Court further broadened application of the right to include pretrial proceedings in criminal cases. *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1 (1986).

In large measure, the First Amendment right of access to judicial proceedings rests on " 'this nation's historic distrust of secret proceedings.' " *Richmond Newspapers, Inc.*, 448 U.S. at 591 (Brennan, J., concurring) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). In considering the right of access, this Court has repeatedly observed:

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Press Enterprise II, 478 U.S. at 13; *Press-Enterprise I*, 464 U.S. at 509; *Richmond Newspapers, Inc.*, 448 U.S. at 572.

In each instance where this Court has applied the First Amendment right of access to judicial proceedings, it has based its decision on a determination that public confidence in the judicial system would be undermined if trial judges had the unfettered discretion to bar the press and the public from observing the proceeding at issue. *E.g., Richmond Newspapers, Inc.*, 448 U.S. at 570-72; *Globe Newspaper Co.*, 457 U.S. at 606; *Press-Enterprise I*, 464 U.S. at 507-509; *Press-Enterprise II*, 478 U.S. at 13.

Furthermore, this Court has applied the right of access to particular proceedings because of their decisive nature in resolving litigation. The right attaches to trials in part because of the "pivotal role" trials play in the judicial process. *Richmond Newspapers, Inc.*, 448 U.S. at 595 (Brennan, *J.*, concurring). Ruling that "the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise," the Court ruled that preliminary hearings must be open to the public because of their increasingly important role in resolving criminal cases. The Court found that the outcome of those hearings leads to disposition through plea bargaining "in a majority of cases." The Court decided that, as a consequence, the hearings "are often the final and most important step" in criminal litigation and thus present "the sole occasion for public observation of the criminal justice system." *Press-Enterprise II*, 478 U.S. at 9, 12; *see Waller v. Georgia*, 467 U.S. 39, 46-47 (1984) (in many cases, pretrial suppression hearings are "the *only* trial, because the defendants thereafter plead guilty pursuant to a plea bargain"); *United States v. Criden*, 675 F.2d 550, 556-57 (3d Cir. 1982) (pretrial hearings often are "the most critical stage" because their outcomes "often determine whether the defendant or the Government wants to proceed to trial").

By design and in practice, summary jury trials play a similarly decisive role in civil litigation. Like pretrial criminal hearings, summary jury trials are adversarial proceedings requiring presentation of argument and evidence in the courtroom, the outcome of which usually causes the parties to negotiate a settlement rather than go to trial. In 1986, Judge Lambros reported that virtually all of the 150 summary jury trials that he had conducted caused disposition through settlement rather

than trial. Other trial judges report similar results.[11] The conclusive effect of summary jury trials is underscored by the fact that the parties may stipulate at any time that the verdict is a final determination of the merits.

The assertions of the courts below that trial judges have the unrestrained power to dispose of civil cases using secret summary jury trials ignores the vital public interest in observing the role of the judicial process in resolving disputes. Public confidence in the judiciary as a fair and neutral arbiter can only decline if judges are free to conduct secret courtroom proceedings, permanently prohibit the parties and the jurors from revealing what transpired, and then announce afterward that the proceedings prompted the parties to settle the case. The threat to public confidence is intensified where, as here, the case involves issues of great import that can affect the public. This Court has observed:

> It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view, an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.

Richmond Newspapers, Inc., 448 U.S. at 571.

Here, the secret proceedings not only prompted the resolution of a case involving important public issues, but the trial court adjudicated a dismissal, approving the terms of the settlement based on the presentations of the parties during the proceedings. Nevertheless, the court refuses to disclose, and will not allow the participants to disclose, anything about those presentations. The Third Circuit identified the kind of problem posed by that precedent.

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[11] Jud. Conf., Second Cir., 115 F.R.D. at 368; Gwinn, *Summary Jury Trial: An Explanation And Analysis*, 52 Ky. Bench & Bar 16, 17, 57 (1988).

> Public confidence cannot long be maintained where important judicial decisions are . . . announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.

United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir. 1978).

Ironically, promoting public confidence in the judicial system is one of the goals of the summary jury trial. The procedure is supposed to maintain public confidence by speeding up the disposition of cases that are crowding court dockets. *See* Lambros, 29 Vill. L. Rev. at 1363. It seems self-evident that public confidence will be lost if judges may respond to their expanding dockets by disposing of cases through secret courtroom proceedings and permanent gag orders. Yet, the courts below would sacrifice the important values of open democracy for perceived gains in judicial efficiency.[12] *See Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (rejecting the assertion that the interest in inducing a party to settle justifies barring public inspection of a trial transcript).

[12] In ignoring the threat to public confidence posed by secret summary jury trials, the courts below also ignored two key components of the proceeding which this Court recognizes as hallmarks of openness. One is the trial courtroom, "a public place where the people generally—and representatives of the media—have a right to be present." *Richmond Newspapers, Inc.*, 448 U.S. at 578, 573 n.9 (plurality opinion), *see* 593 (Brennan, *J.*, concurring) *and* 600 (Stewart, *J.*, concurring). The other is the democratic institution of a petit jury. From the community juries of ancient Athens to the "town meeting" juries of early England and the petit juries of early America, the "public character of [jury] proceedings [has] remained unchanged." *Press-Enterprise I*, 464 U.S. at 506; *see* L. Moore, Palladium of Liberty 2 (1972); F. Pollock, The Expansion of the Common Law 140 (1904). By declaring that trial judges have the unlimited discretion to conduct summary jury trials in secret, the courts below would pervert the trial courtroom and the petit jury, two time-honored symbols of an open democracy, into instruments of concealment.

In this litigation, three public utilities charged one of the world's largest corporations with fraudulently supplying them with an unsafe nuclear power system. To the average citizen in southern and central Ohio, the continuing secrecy surrounding the judicial system's role in resolving those charges can only raise suspicion and cynicism. This Court cannot expect that public confidence, so vital to an effective judiciary, will thrive where judges conduct decisive courtroom proceedings behind closed doors in permanent, court-imposed secrecy.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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November 15, 1988

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided August 18, 1988)

Nos. 87-3950, 87-4054.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE CINCINNATI GAS AND ELECTRIC COMPANY; THE DAYTON POWER AND LIGHT COMPANY; COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY,
Plaintiffs-Appellees,

v.

GENERAL ELECTRIC COMPANY; SARGENT AND LUNDY ENGINEERS, AND THE INDIVIDUAL PARTNERS OF SARGENT AND LUNDY,
Defendants-Appellees,

THE CINCINNATI POST, A DIVISION OF THE E.W. SCRIPPS COMPANY; DAYTON NEWSPAPERS, INC., D/B/A THE DAYTON DAILY NEWS AND JOURNAL HERALD; THE DISPATCH PRINTING COMPANY D/B/A THE COLUMBUS DISPATCH,
Non-Party Appellants.

[854 F.2d 900]

Affirmed.

George Clifton Edwards, Jr., *Senior Circuit Judge*, filed a statement concurring in part and dissenting in part.

Stephen Patsfall, John Flessa, Wood & Lamping, Cincinnati, Ohio, Bruce W. Sanford (argued), Baker & Hostetler, Washington, D.C., David L. Marburger, Caryn L. Zimmerman, Baker & Hostetler, Cleveland, Ohio, *for non-party appellants.*

Robert G. Stachler, Cincinnati, Ohio, *for CG & E.*

Stephen F. Koziar, Dayton, Ohio, *for Dayton Power.*

Michael P. Graney, A. Joseph Dowd, John B. Shinnock, Columbus, Ohio, *for Columbus & Southern Ohio Elec. Co.*

Before KEITH, and NORRIS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge.*

KEITH, *Circuit Judge.*

Appellants, The Cincinnati Post, et al., appeal pursuant to 28 U.S.C. § 1291 from orders issued by the district court on September 14, 1987, October 5, 1987, and November 20, 1987, which appellants contend denied them their first amendment right of access to the summary jury trial conducted in the underlying action. For the reasons set forth below, we AFFIRM the district court.

I.

This appeal arises out of a lawsuit involving the design and construction of the William H. Zimmer Nuclear Power Plant ("Plant"). The plaintiffs below, The Cincinnati Gas and Electric Company, The Dayton

Power and Light Company and Columbus and Southern Ohio Electric Company (plaintiffs-appellees), were three Ohio electric utility companies that undertook jointly to build the Plant. In July of 1984, plaintiffs filed a lawsuit against the General Electric Company and Sargent & Lundy Engineers (defendants-appellees), an architectural and engineering firm, alleging breach of contractual duties and common law concerning the modification of the Plant. Plaintiffs later amended their complaint against the General Electric Company to add fraud and RICO claims.

From the outset of this litigation, the parties recognized the need for confidential treatment of much of the material that would be produced in discovery. As a result, the parties negotiated a comprehensive protective order, which the magistrate approved on December 6, 1984. *See* Joint Appendix at 243. This order provided varying degrees of protection for documents classified as "Confidential" or "Highly Confidential" by the party producing them. The order restricted the use by nonproducing parties of documents accorded either level of confidentiality to "the prosecution or defense of this action," or to other proceedings arising in connection with the Plant. *Id.* at 245. In addition, the order provided that any reference to "Highly Confidential" documents in motions, briefs, or other court papers or filings had to be accompanied by appropriate markings and separately filed under seal. *Id.* at 247.

On June 26, 1987, the district court issued an order requiring the parties to participate in a summary jury trial scheduled to commence on September 8, 1987.[1] The

[1] The summary jury trial was developed in 1980 by United States District Judge Thomas D. Lambros. The primary purpose of the summary jury trial is the "settlement of disputes." Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States*, 103 F.R.D. 461, 465 (1984).

order included a provision closing the proceeding to the press and public. That provision stated that "[t]he proceedings, and all results thereof, shall be confidential, and shall not be disclosed other than to the parties, their attorneys, consultants and insurers. The jurors shall be appropriately instructed as to such confidential treatments." Joint Appendix at 222.

On September 4, 1987, appellants moved to intervene in the underlying action for the limited purpose of challenging the order closing the summary trial. On September 14, 1987, 117 F.R.D. 597, the district court denied appellants' motion to intervene, holding that they had no right to attend the summary jury trial. The court observed that "[t]he summary jury trial, for all it may appear like a trial, is a settlement technique." Joint Appendix at 185. Accordingly, the court held that the press had no first amendment right of access because: (1) there is no tradition of access to summary jury trials or to other recognized settlement devices, Joint Appendix at 180; and (2) public access "does not play a particularly significant positive role" in the functioning of the summary jury trial because "the proceeding is non-binding and has no effect on the merits of the case, other than settlement." Joint Appendix at 190.[2]

On October 5, 1987, the district court amended its September 14, 1987, order: (1) to incorporate an oral order issued on September 21, 1987, restricting communications between the mock jurors and the press and public until the case had ended; and (2)

[2] Moreover, Judge Spiegel emphasized that the summary jury trial was conducted with "the cooperation of the parties" and that his order closing the summary jury trial was in response to General Electric's substantial concerns regarding the potential lack of confidentiality. Joint Appendix at 184.

to add a provision requiring that "the list identifying prospective jurors on the panel for the summary jury trial, as well as those who actually served on the summary jury trial, shall remain sealed until the conclusion of this litigation." The court explained that "[t]o disclose [the mock jurors'] identity at this time may defeat the confidentiality of the jury's decision and would be inconsistent with our Order closing the proceedings to the public." Joint Appendix at 193-194.

Less than two months after the conclusion of the summary jury trial, the parties reached a settlement. On November 20, 1987, the district court issued an order approving the terms of the settlement and dismissing the action with prejudice. The court continued the gag orders and the sealing of the transcript and jury list, ruling that "all other Orders in this case concerning the confidentiality of documents and the summary jury trial remain in effect." Joint Appendix at 200-201.

II.

The precise issue before us is whether the first amendment right of access attaches to the summary jury proceeding in this case. Appellants argue that the district court erred in refusing to allow them to intervene for the purpose of attending the summary jury trial proceeding. Appellants specifically argue that: (1) the summary jury proceeding is analogous in form and function to a civil or criminal trial on the merits, and therefore, the first amendment right of access which encompasses civil and criminal trial and pre-trial proceedings also encompasses the summary jury proceedings; and (2) public access would play a significant positive role in the functioning of the judicial system and summary jury trials. *See Press-Enterprise*

Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("*Press-Enterprise II*"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984); *Applications of National Broadcasting Co., Inc.*, 828 F.2d 340 (6th Cir.1987).

Appellees contend that the first amendment right of access does not apply to summary jury proceedings. Appellees argue that settlement proceedings are totally lacking in any tradition of public access, and that appellants exalt form over function in arguing that a summary jury trial is no different from a trial on the merits. *See, e.g., Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir.1985) (citation omitted) ("[s]ecrecy of settlement terms ... is a well-established American litigation practice ..."). Appellees further argue that public access would not play a significant positive role in the functioning of summary jury trials. We agree with appellees' arguments and hold that the first amendment right of access does not attach to summary jury trial proceedings.[3]

The Supreme Court has in recent years decided a number of cases dealing with the right of access. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898,

[3] Appellees also argue that appellants' motion to intervene was untimely and no reasonable explanation for the delay can be proffered. *See Stotts v. Memphis Fire Department*, 679 F.2d 579, 582 (6th Cir.), *cert. denied*, 459 U.S. 969, 103 S.Ct. 297, 74 L.Ed.2d 280 (1982). We need not entertain this issue because we are in agreement with the lower court that "the [substantive] issues raised ... [are] sufficiently serious to merit our consideration." Joint Appendix at 178.

61 L.Ed.2d 608 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100, S.Ct. 2814, 65 L.Ed.2d 973 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("*Press-Enterprise I*"); *Walter v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("*Press-Enterprise II*").

In *Press Enterprise II* the Court held that a qualified right of access applied in criminal proceedings to a preliminary hearing which was conducted before a magistrate in the absence of a jury. The Court held that the analysis of a first amendment claim of access involves two "complimentary considerations." First, the proceeding must be one for which there has been a "tradition of accessibility." *Press Enterprise II*, 106 S.Ct. at 2740 (citation omitted). This inquiry requires a court to determine "whether the place and process [to which access is sought] has historically been open to the press and general public." *Id.* (citation omitted). Second, public access must play a "significant positive role in the functioning of the particular process in question." *Id.* (citation omitted). Moreover, even if these elements are satisfied, the right of access is a qualified one and must be outweighed by a strong countervailing interest in maintaining the confidentiality of the proceedings. *Id.* at 2741 (citation omitted).

With regard to the first part of the test, we concur with the district court that "there is no historically recognized right of access to summary jury trials in that this mechanism has been in existence for less than a decade." Joint Appendix at 180. The summary jury trial

is a device that is designed to settle disputes.[4] Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States,* 103 F.R.D. 461, 465 (1984). Settlement techniques have historically been closed to the press and public. *See, e.g., Palmieri,* 779 F.2d at 865. Thus, we find that "while the history of the summary jury trial is limited, there is general agreement that historically settlement techniques are closed procedures rather than open." Joint Appendix at 182.

Appellants argue that summary jury trials are structurally similar to ordinary civil jury trials, which have historically been open to the public. However, it is clear that while the summary jury trial is a highly reliable predictor of the likely trial outcome, there are manifold differences between it and a real trial. In a summary jury proceeding, attorneys present abbreviated arguments to jurors who render an informal verdict that guides the settlement of the case. Normally, six mock jurors are chosen after a brief voir dire conducted by the court. Following short opening statements, all evidence is presented in the form of a descriptive summary to the mock jury through the parties' attorneys. Live witnesses do not testify, and evidentiary objections are discouraged. Lambros, *The Summary Jury Trial,* 103 F.R.D. at 483-84. Thus, some of the evidence disclosed to the mock jury might be inadmissible at a real trial. See Spiegel, *Summary Jury Trials,* 54 U.Cin.L.Rev. 829, 830-31 (1986).

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[4] Courts have the power to conduct summary jury trials under either Fed.R.Civ.P. 16, or as a matter of the court's inherent power to manage its cases. *See Link v. Wabash Railroad Co.,* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *see also* Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States,* 103 F.R.D. at 469.

Following counsels' presentations, the jury is given an abbreviated charge and then retires to deliberate. The jury then returns a "verdict." Lambros, *The Summary Jury Trial,* 103 F.R.D. at 484. To emphasize the purely settlement function of the exercise, the mock jury is often asked to assess damages even if it finds no liability. Also, the court and jurors join the attorneys and parties after the "verdict" is returned in an informal discussion of the strengths and weaknesses of each side's case. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes,* 69 Judicature 286, 289 (Feb.-Mar. 1986).

At every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference. It is important to note that the summary jury trial does not present any matter for adjudication by the court.[5] Thus, we find appellants' argument to be unpersuasive and therefore hold that the "tradition of accessibility" element has not been met.

The second criterion in the Court's public access analysis is whether access "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II,* 106 S.Ct. at 2740. Appellants contend that public access would have community theraputic value because of the importance of the nuclear power and utility rate issues raised. We disagree.

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[5] Appellants' assertion that the summary jury trial is like an adjudication because the parties are compelled to participate is incorrect. The district court expressly stated that the proceeding was undertaken with the cooperation of the parties. Although the court denied appellants' motion to vacate the order setting the summary jury trial, it accommodated appellants' concerns to keep the proceeding confidential, thereby making it unnecessary for appellants to challenge the court's denial of the motion.

"[I]t is necessary to consider whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.' " *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32, 104 S.Ct. 2199, 2207, 81 L.Ed.2d 17 (1984). The summary jury trial can play a particularly useful role in facilitating the settlement of complex cases and is typically employed in cases that either will consume significant judicial resources if they proceed to trial, or that are not amenable to settlement through other techniques. However, where a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement. Thus, public access to summary jury trials over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device. Therefore, allowing access would undermine the substantial governmental interest in promoting settlements, and would not play a "significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 106 S.Ct. at 2740.[8]

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[8] Consistent with this rationale, courts have rejected first amendment claims of access, even though the information involved was of undeniable public interest. *See Seattle Times*, 467 U.S. at 31, 104 S.Ct. at 2206 (trial court permitted to prohibit public dissemination of information obtained in pretrial discovery notwithstanding that "there certainly is a public interest in knowing about respondents"); *The Courier-Journal v. Marshall*, 828 F.2d 361, 363 (6th Cir.1987) (newspapers had no first amendment right of access to discovery materials, despite the recognition that "proceedings [were] of intense public concern").

Appellants' claim of a public "right to know" has no validity with regard to summary jury trials. As the lower court correctly noted, the public would have no entitlement to observe any negotiations leading to a traditional settlement of the case, Joint Appendix at 186, and the parties would be under no constitutional obligation to reveal the content of the negotiations. Thus, the public has no first amendment right to access to the summary jury trial.

Appellants also argue that the summary jury trial should be open to the public because the facilitation of a settlement between the parties has a final and decisive effect on the outcome of the litigation. To support their argument, appellants rely on the Court's language in *Press-Enterprise II,* 106 S.Ct. at 2742-43, that preliminary criminal hearings must be open to the public because of their decisive effect on criminal cases. We disagree.

In contrast to the summary proceedings in this case, the proceeding at issue in *Press-Enterprise II* resulted in a binding judicial determination which directly affected the rights of the parties. Summary jury trials do not present any matters for adjudication by the court.[7] Thus, it is the presence of the exercise of a court's coercive powers that is the touchstone of the recognized right to access, not the presence of a procedure that might lead the parties to voluntarily terminate the litigation. Therefore, we find appellant's argument to be meritless.

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[7] Summary jury trials do not affect the parties' right to a full trial *de novo* on the merits. "If one or both parties feel the result of the jurors' deliberations is grossly inequitable, the right to proceed to a full trial is in no way prejudiced." Lambros, *The Summary Jury Trial,* 103 F.R.D. at 482.

Accordingly, for the reasons set forth above, we AFFIRM the judgment of Judge Arthur Spiegel, United States District Court, Southern District of Ohio.

GEORGE CLIFTON EDWARDS, JR., *Senior Circuit Judge,* concurring in part and dissenting in part.

The proceeding conducted in this case resulted in a settlement and a court decree. It resembled both settlement negotiations and a bench trial. While I join the majority in holding that the negotiations which led to the settlement of this case could properly be conducted in camera, I do not agree that the record can appropriately continue to be sealed after a settlement has been effected. I recognize that the view expressed above might impede some settlements, but I cannot reconcile complete suppression of this record with the First Amendment which our forefathers placed as the first condition for the founding of our nation.

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed September 14, 1987)

No. C-1-84-0988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE CINCINNATI GAS & ELECTRIC COMPANY, *et al.*,
Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, *et al.*,
Defendants.

ORDER AMENDING ORDER DENYING MOTION TO INTERVENE OCT. 5, 1987

[117 F.R.D. 597]

Stephen Patsfall, Cincinnati, Ohio, *for Proposed Newspaper Intervenors.*

Robert G. Stachler, Cincinnati, Ohio, *for Cincinnati Gas and Elec. Co.*

Stephen E. Koziar, Dayton, Ohio, *for Dayton Power and Light Co.*

Michael P. Graney, Simpson, Thacher & Bartlett, Columbus, Ohio, *for Columbus and Southern Ohio Elec. Co.*

Kenneth R. Logan, Robert Cusumano, Simpson, Thacher & Bartlett, New York City, James N. Nowacki, James C. Munson, Chicago, Ill., *for plaintiffs.*

James R. Adams, Elizabeth K. Lanier, Cincinnati, Ohio, William A. Gordon, John M. Carroll, Harley Hutchins, Chicago, Ill., *for General Elec. Co.*

Bruce M. Allman, Cincinnati, Ohio, *for Sargent & Lundy Engineers*; Mary Ellen Hogan, Walter M. Jones, Frank M. Covey, Jr., Chicago, Ill., *of counsel.*

Steven P. Handler, David J. Seery, Dewey J. Caton, Kent S. Ray, Wm. R. Jentes, Chicago, Ill., *pro hac vice, for Sargent & Lundy Engineers.*

ORDER

SPIEGEL, *District Judge.*

Before this Court is the joint motion of The Cincinnati Post, The Dayton Daily News and Journal Herald, The Columbus Dispatch, and The Cincinnati Enquirer to intervene, under Rule 24(b), Fed.R.Civ.P., in the above-captioned case for the limited purpose of challenging the closure of the summary jury trial[1] proceeding in this case and related motions (doc. 659), to which plaintiffs have responded in support of movant's motion (doc. 666), and defendant General Electric has responded in opposition (doc. 665), and movants have replied (doc. 672). Defendant Sargent & Lundy has not

[1] For an explanation of the summary jury trial procedure, *see generally*, S. Arthur Spiegel, "Summary Jury Trials," 54 U.Cin.L.Rev. 829 (1986).

responded. For the reasons set forth below, we conclude that our closure order of June 28, 1987 should not be vacated and the proceeding, which is in progress, should remain closed to the press and public. We note, however, that we have ordered that the parties arrange for a copy of the transcript of the proceedings to be provided to the Court, which will be preserved in the event our Order is successfully challenged on appeal, and such transcript is being prepared as ordered.

Movants argue that the press and public have a First Amendment right under the U.S. Constitution to attend the summary jury trial proceeding. They contend that this proceeding "may be the only forum through which the public can learn about the facts underlying the crucial and burning public issues which are central to this case" (doc. 659 at 2). Movants rely on *In re The Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470 (6th Cir. 1983) for the proposition that the Court must afford the press an "independent opportunity" to state objections to a closure order. Defendant General Electric argues that movants' motion should be denied as untimely, where there is no legitimate excuse for delay, under the criteria set forth in *Stotts v. Memphis Fire Dep't.*, 679 F.2d 579, 582 (6th Cir.), *cert. denied*, 459 U.S. 969, 103 S.Ct. 297, 74 L.Ed.2d 280 (1982). Movants have offered their explanation for delay in their reply memo. We need not decide this issue, however, because we believe the issues raised by movants to be sufficiently serious to merit our consideration.

Turning to the substantive matter before us, the Supreme Court has recognized a qualified First Amendment right of access to judicial proceedings, including preliminary proceedings, in the criminal context. *Press-Enterprise Co. v. Superior Court, (Press-*

Enterprise II), _____ U.S. _____, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Movants point out that several courts have held that the right applies in civil cases as well. *See* doc. 659 at 9. Movants, in their reply, also direct our attention to *United States v. Presser, Application of National Broadcasting Co.*, 828 F.2d 340, 14 Media 2 Rep. (BNA) 1417 (6th Cir. 1987).

In *Press-Enterprise II*, the Supreme Court held that a qualified right of access applied in criminal proceedings to a preliminary hearing which was conducted before a Magistrate in the absence of a jury. The Court considered two criteria in its determination: First, whether "there has been a tradition of accessibility to preliminary hearings of the type conducted in California" and, second, "whether public access to preliminary hearings as they are conducted in California plays a particularly significant positive role in the actual functioning process." *Press-Enterprise II*, 106 S.Ct. at 2741, 2742. The Court found that there was a long history of preliminary hearings before neutral and detached Magistrates being open to the public and that the absence of a jury—the long recognized "safeguard against the corrupt or overzealous prosecutor and against the complaint, (sic) biased, or eccentric judge"—is a circumstance which highlights the importance of public access to the proceeding. *Id.* at 2743. Concluding that a qualified First Amendment right of access attached to the proceeding, the Supreme Court adopted the California Supreme Court's interpretation of the California "access" statute, which was that the proceeding shall be closed upon finding "a reasonable likelihood of substantial prejudice" to the defendant. *Id.*

(citation omitted). In addition, the Supreme Court found that the lower Court failed to consider alternatives short of complete closure. *Id.*

Guided by the Supreme Court, we first consider whether the qualified First Amendment right of access attaches to the summary jury trial proceeding in this case, *i.e.*, whether there has been a tradition of accessibility to such proceedings and whether access plays a significant positive role in the actual functioning of the process. On this first question, we concur in defendant General Electric's observation that there is no historically recognized right of access to summary jury trials in that this mechanism has been in existence for less than a decade. The summary jury trial was developed by United States District Judge Thomas D. Lambros of Cleveland, Ohio in 1980 as an alternative method of dispute resolution. Its primary goal has been described as a means of "decimat(ing) those barriers to settlement which lead to expensive and lengthy jury trials. Because it has the capacity to settle cases by enabling lawyers and litigants the opportunity to look at the strengths and weaknesses of their case through a 'looking glass' before trial, this program has been labeled a 'Force with a Focus.' " "The Summary Jury Trial," A Presentation of the Judicial Conference of the Sixth Circuit of the United States, Louisville, Kentucky, May 16, 1985. Chief Justice Warren Burger has commended the procedure as a useful approach to settlement and has noted that "(i)n a summary jury trial, attorneys present *abbreviated* arguments to jurors who render an *informal* verdict that guides settlement of the case." *Id.*, quoting the *1984 Year-End Report of the Judiciary* (emphasis added).

We believe that the Court has the power to conduct summary jury trials either under Rule 16, Fed.R.Civ.P., or as a matter of the Court's inherent power to manage its own cases. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *Irvin E. Eash v. Riggins Trucking Co.*, 757 F.2d 557 (3rd Cir. 1985). Rule 16(a)(5) provides that the Court may, in its discretion, direct the parties to appear before it for conferences for the purpose of "facilitating the settlement of the case." Rule 16(c)(7) indicates that the Court and parties may take action with respect to "the possibility of settlement or the use of extra-judicial procedures to resolve the dispute." And, Rule 16(c)(10) authorizes the use of "special procedures for managing potentially difficult or protracted actions . . ."

The summary jury trial may be novel, but we are confident that it is nonetheless one member of an ever-growing family of settlement techniques. Thus, while the history of the summary jury trial is limited, there is general agreement that historically settlement techniques are closed procedures, rather than open. Movants argue that while the "history of access" prong of the Supreme Court's mode of analysis in these cases is important, the Court has found the "crucial" question to be the second prong of the analysis, *i.e.*, "whether access to a particular government process is important in terms of that very process" (*see* doc. 659, at 11, *citing Richmond Newspapers, Inc.*, 448 U.S. at 589, 100 S.Ct. at 2834 (Brennan, J., concurring) and *Globe Newspaper Co. v. Superior Court* (1982), 457 U.S. 596, 605, 102 S.Ct. 2613, 2619, 73 L.Ed.2d 248).

Defendant General Electric directs our attention to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which holds that there is no

First Amendment Right of access to pretrial civil discovery material, where such material has not been historically available to the public, and also to *In re Courier Journal*, 828 F.2d 361 (6th Cir. 1987), which holds that there is no First Amendment right of access to "the fruits of discovery" under a *Seattle Times* analysis. Movants argue that *Application of National Broadcasting, supra*, is the more relevant Sixth Circuit case in that the Court recognized the right of access to documents and pretrial proceedings relating to a motion to disqualify the judge for bias and conflicts of interest by litigants' attorneys. We note, however, that the Court also found such matters to be traditionally open to the public.

Movants argue that access to this proceeding is important in terms of the very process of this proceeding, on the grounds that the parties are given the option to stipulate that the verdict in the summary proceeding be binding on the parties, further, that the summary jury trial may result in the settlement of the case so that the "sole occasion" for public observation of the justice system's role in this type of dispute resolution, in a case involving issues of paramount public interest concerning nuclear power plants will be lost; and, finally, the summary jury trial will "operate and proceed like a trial," *i.e.*, citizens are summoned for and participate as jurors in a case presided over by a judge and where evidence will be presented and a verdict rendered.

In their reply, movants focus on the similarities between a summary jury trial and a trial on the merits and take issue with General Electric's characterization of the proceedings as one of settlement by indicating the ways in which summary jury trials differ from traditional

settlement conferences. Thus, by analogizing to a trial on the merits, rather than settlement procedures, movants argue that General Electric's contention that there is no "tradition of accessibility" for such proceedings is incorrect, and that public access to the proceedings is as important to the summary jury trial process as it is to an actual trial.

We are in complete agreement with movants that the issues central to the merits of this case present matters of paramount public concern. And, as an aside, we note that were the matter one purely within the Court's discretion, we would advocate opening the procedure to the press and public, in the belief that all parties, as well as the public, would be well-served by an airing of the issues.

However, the Court conducts summary jury trials with the cooperation of the parties. The history of General Electric's concerns regarding this procedure are a matter of public record, as well as our Order closing the summary jury trial in response to these concerns. Regardless of our views on the general merits of opening the procedure to the press and public, the only question before us is whether the Constitution mandates that the procedure be open to the press and public. And, as indicated above, we conclude it does not.

We find that movants' contentions, as outlined above, exalt form over function. The summary jury trial, for all it may appear like a trial, is a settlement technique. It was designed as such and was so presented by the Court to the parties in this case. Movants contend that the provision of our Order which allows the parties to stipulate that the verdict rendered by the summary jury trial be binding transforms the proceeding into a "secret trial." First, General Electric correctly points out

that the parties in this case have not so stipulated. And, we are not convinced that our provision for such a stipulation is so different from a settlement agreement so as to change the character of a summary jury trial from that of settlement technique to that of a trial on the merits. However, in an abundance of caution, on our own initiative, which is unopposed by the parties in this case, we hereby vacate paragraph 20 of our June 28 Order relating to counsels' ability to stipulate that a consensus verdict be deemed a final determination of the merits.

Movants next contend that the summary jury trial may present the "sole occasion" for the public's observation of the judicial system's role in this type of dispute resolution and that the public will miss the opportunity to hear the arguments of each side as they relate to an issue of paramount public concern. While this may be true, such results will always follow in a case that settles prior to trial on the merits. Thus, should this case settle, either pursuant to more traditional settlement techniques or the summary jury trial, the public would be precluded from hearing the actual evidence in the case. As defendant General Electric argues, the fact that the summary jury trial is a more formal process than the traditional settlement conference is not determinative of the existence of a First Amendment right of access.

We note that while movants have focused on the similarities between a trial on the merits and a summary jury trial, the differences are manifold. Because the purpose of the summary jury trial is settlement by means of giving the parties insights into the strengths and weaknesses of their case, the proceedings are markedly different. Specifically, in this case, the parties have been given seven (7) days in which to present a

summary of the evidence in the case, while trial on the merits is anticipated to last for many months. As a matter of necessity, not all of the evidence that would be presented at trial will be covered by the summary proceeding. No live testimony and, thus, no testing of credibility or cross-examination of witnesses, is permitted. Moreover, given the flexibility of this procedure, the summary jury trial in this case deals with only selected issues; others, that will be tried on the merits, if the case goes to trial, are simply omitted from this procedure for the sake of simplicity and to focus on those issues that appear to be central to any meaningful settlement discussions in this case.

The heart of movants' final contention is that the procedure is trial-like to the extent that it is judicially supervised and involves jurors; movants conclude that the summary jury trial is the functional equivalent of a trial. We do not dispute the fact that we select jurors from the community to effectuate the goals of the summary jury trial. This fact is a distinguishing element as movants point out. However, contrary to movants' understanding, the jury is advised from the outset of the proceeding that they are participating in a dispute resolution procedure. They are informed that they will be helping the parties resolve their disputes by appraising the strengths and weaknesses of the case, as well as by assessing the value of the case. In addition, because of the flexibility of this procedure, we are able to ask the jury to undertake considerations directed toward settlement of the case that would never occur in an actual trial. Specifically, the jury is asked not only to consider questions of liability and damages, but the jury is to *assume* liability and assess damages, if any. And, the verdict is advisory. Thus, we reject movants' motion that the "*Raison d'etre*" of the summary jury trial is "to

present the parties' case to an authentic jury" rather than to achieve settlement. We readily agree that we attempt to have the proceeding mimic trial procedures to the degree possible, but this effort does not detract from the stated goal of settlement—to the contrary, the realism of the procedure is key to successful functioning.

Similarly, we are unpersuaded by movants contrasting the summary jury trial and "typical" settlement conferences. Summary jury trials are by their nature atypical. The summary jury trial and other settlement concepts have been developed in order to accommodate complex litigation for which the typical settlement techniques are often not well-suited. In addition to movants arguing that it is incorrect to describe the summary jury trial as a pretrial settlement conference, they also attach some importance to the fact that the "final pretrial conference" has occurred in this case. First, we consider the summary jury trial to be a pretrial proceeding; we recognize that it is not a "conference" in the traditional sense. Second, we want to dispel what appears to be movants' misunderstanding that the final pretrial conference in this case relates to the summary jury trial. The final pretrial conference in this case, as in all cases, relates to the trial on the merits. The summary jury trial is the final settlement technique undertaken by the Court before trial on the merits. The final pretrial conference and the final pretrial order resulting therefrom delineate the issues of fact and law that must be resolved in the litigation. Finally, it should be remembered that these proceedings are nonbinding and, other than fostering the hope of settlement, they have no effect on the merits or outcome of this case. Viewed in these terms, we find little force to movants' contention that access will assure that these proceedings will be conducted fairly.

To the extent there is concern that any proceeding be fair, we do, as movants are aware, have a jury participating in this proceeding. So, while we are of the opinion that the presence of a jury does not trigger a First Amendment right of access, we do find that this public participation does ameliorate movants' concerns to the extent the jury will act as the "inestimable safeguard" against unfairness, as noted by the Supreme Court in *Press-Enterprise II.*

For all of the above reasons, we conclude that summary jury trials, as recognized settlement techniques, are in a class of proceedings that have been closed to the public to best effectuate their purposes. Thus, the "tradition of access" component of the *Press-Enterprise II* analysis has not been met. Similarly, we conclude that public access to summary jury trials does not "play a particularly significant positive role in the actual functioning of the process," as required in *Press-Enterprise II* in that the proceeding is non-binding and has no effect on the merits of the case, other than to promote settlement.

Therefore, we find that the qualified First Amendment right of access to certain judicial proceedings does not attach to this summary jury trial. Accordingly, movants' motion (doc. 659) to intervene for the limited purpose of challenging the closure of the summary jury trial in this case is denied.

SO ORDERED.

ORDER AMENDING ORDER DENYING MOTION TO INTERVENE

(Filed October 5, 1987)

C-1-84-0988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE CINCINNATI GAS & ELECTRIC COMPANY, *et al.*,
Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, *et al.*,
Defendants.

ORDER AMENDING ORDER DENYING MOTION TO INTERVENE

Before the Court is the motion to amend the September 14, 1987 Order of this Court (doc. 676) wherein we denied movants' motion to intervene in the above captioned case for the limited purpose of challenging the June 28, 1987 Order[1] of this Court (doc. 482), closing the summary jury trial in this case. Movants request an amendment to the September 14 Order to include our Orders sealing the jury list and prohibiting the jurors serving on the summary jury trial from discussing the proceeding with the press or public

[1] The docket sheet in this case reflects that the date of the Order closing the summary jury trial proceeding to the public is June 26, 1987.

after the conclusion of the summary jury trial. Movants further request that we unseal that portion of the transcript of the summary jury trial, wherein we issued the Order restricting the communications of the jurors. Finally, movants request that the Court issue an Order at this time that the jury list be unsealed effective immediately. Movants indicate that they intend to appeal our September 14 Order and, because time is of the essence, we shall rule on the instant motion without delay.

To assist movants in their efforts to perfect their appeal of our September 14 Order and because we believe there is no compelling reason not to provide movants with the substance of our Order restricting juror-communication, we undertake, *ex parte,* to amend our previous Order in the following manner.

First, we amend our prior Order to include the Order issued on September 21, 1987, by this Court at the close of the summary jury trial restricting juror communication with the press or public until the conclusion of this litigation. Because this Order was issued orally from the Bench, we have, per movants' request, appended a copy of the transcript of this portion of the summary jury trial proceedings to this Order and incorporate the substance of our Order restricting jury communication as an amendment to our September 14 Order.

Movants next request that we amend our September 14 Order to include our Order sealing the jury list. We do not believe the Court issued a specific order sealing this list, which leads us to conclude that the office of the Clerk did so, knowing that the Court had issued an Order closing the summary jury trial to the public. In order to clarify this matter and to ensure that all matters

in controversy are appropriately before the Court of Appeals, we amend our September 14 Order to include the following: We Order that the list identifying prospective jurors on the panel for the summary jury trial, as well as those who actually served on the summary jury trial, shall remain sealed until the conclusion of this litigation. To disclose their identity at this time may defeat the confidentiality of the jury's decision and would be inconsistent with our Order closing the proceedings to the public. Therefore, movants' motion to immediately unseal the jury list is hereby denied.

Accordingly, we amend our September 14 Order to include orders restricting jury communication with the press and public until the conclusion of this litigation and sealing the jury list. Moreover, we have unsealed that portion of the transcript from the summary jury trial that contains our Order and comments to the jury concerning the restriction on their communication. And, in keeping with the above, we have denied movants' request for an Order unsealing the jury list at this time.

SO ORDERED.

APPENDIX

Cincinnati, Ohio

Monday, September 21, 1987

(The Court's Order to the Summary Jury, re: Verdict.)

EXCERPTS OF PROCEEDINGS BEFORE THE HONORABLE S. ARTHUR SPIEGEL AND SUMMARY JURY TRANSCRIPT ORDERED BY:
Stephen J. Patsfall, Esq.

APPEARANCES:

For CG & E: Robert Stachler, Esq. and co-counsel

For ColSOE: Kenneth Logan, Esq. and co-counsel

For Dayton P & L: James Nowacki, Esq. and co-counsel

For G.E.: Bruce Hoff, Esq. and co-counsel

For Sargent-Lundy: Frank Covey, Esq. and co-counsel

Law Clerk: Joan Hefferan, Esq.

Courtroom Clerk: Paul J. Schulz, III

Court Reporter: Mary Ann Ranz

MONDAY, SEPTEMBER 21, 1987

* * *

THE COURT: Let me explain what we do now. After I excuse you and discharge you for the work you performed, I ask the parties—those out of town—to stay in town and take your advisory verdict that has been based on the liability and the value of the claims, and see

what they can do to see if they can find a way to resolve this knotty problem, this litigation. It's not over for them. It's not over for the Court, because if we can't do it, the case is scheduled to go to trial in January. Like I said, I have a special instruction for you to explain why you shouldn't talk about this case.

Now that the Summary Jury Trial is over, there is one more matter I would like to discuss with you, and that is the confidentiality of these proceedings. First of all, I would like to say the press has attempted to have the trial open for the public. The interest of the press and the public in this case is understandable. Any case that involves the construction of a nuclear power plant raises legitimate concerns and interest to the public. However, the exercise you and I and the parties have undertaken over the past two weeks is a dispute resolution technique, as I mentioned to you I think at the very beginning when we explained this process. In other words, your findings on liability and damages provide the parties with information that I hope will help them to settle their dispute. In simpler cases, it is often enough to hold a settlement conference in my chambers where the parties and the lawyers can discuss the matter and find a way to resolve their disputes. But such settlement proceedings, of course, are private and confidential.

In a complex case, such as the one you have been working on right here, it is not so easy for the parties to assess the strengths and weaknesses of their case or the value of the claims, and often the lack of this kind of information makes meaningful settlement conferences impossible.

The Courts, out of concern that the barriers to settlement of complex cases result in great costs to the legal system because a case like this can go on for months on end—other litigants are at the courthouse door and want their cases tried and their cases get backed up which causes problems for everyone—have devised a range of settlement techniques to assist the parties in resolving disputes without going to trial, if at all possible.

The Court undertakes the Summary Jury Trial with the cooperation of the parties. We leave the decision as to whether the Summary Jury Trial should be open or not to the parties. In this case, the exercise was undertaken on the premise the Summary Jury Trial proceedings would be closed and I honored their request.

The concern among some of the parties is that if the contents or the results of your decision became public, the prospects of the settlement might be diminished and might increase the difficulty of selecting a jury in the future when this case comes up for trial in a couple of months.

I want to stress that if there is no settlement in this case, however, that the actual trial where there is live testimony, which will last for some length of time as I mentioned, will be open to the press, of course, and will be thoroughly reported to the public and there is no concern that if it is tried in the future the public won't know. At that time you'll be free to talk about what occurred at this time, but not until that time. So, since it is within my authority to order you not to discuss this case or your verdict, I'm going to ask—I order that you not discuss it with anyone when you leave this courtroom.

Now, after all of your work, I'm sure you share the Court's and parties' interest in seeing that this matter is resolved. You contributed a great deal to that process already. And if this case does not settle and a jury verdict is rendered in this case on the merits, you'll be free then to discuss what occurred in these past few weeks.

On behalf of everybody, we would like to thank you for your services here.

* * *

EXCERPTS OF SUMMARY JURY
TRIAL CONCLUDED

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 20, 1987)

No. C-1-84-0988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE CINCINNATI GAS & ELECTRIC COMPANY, *et al.*,
Plaintiffs,

vs.

GENERAL ELECTRIC COMPANY, *et al.*,
Defendants.

ORDER

In an effort to aid in the settlement of this case, this Court convened a summary jury trial on September 8, 1987. At that trial, the parties presented their evidence in the presence of their executive officers, to an eight-person jury. The evidence included descriptive summaries, often in chart form, deposition testimony, interrogatory answers, documents, sworn affidavits, demonstrative evidence and other exhibits.

Pursuant to the settlement agreement of the parties, the findings of the jury trial are released to the following limited extent:

On September 21, 1987, after six days of hearing evidence and arguments of counsel, and including a day-long visit to the Zimmer plant, the jury returned a

unanimous verdict for defendant General Electric on all counts. Specifically, the jury found that General Electric did not commit fraud against the Zimmer owners, that General Electric did not violate the RICO statute, and that plaintiffs' fraud and RICO counts were time-barred. With the exception of the above disclosures, all other Orders in this case concerning the confidentiality of documents and the summary jury trial remain in effect.

In the weeks following the summary jury trial, the parties met a number of times to negotiate settlement agreements. These negotiations were conducted by the chief executives of each party, as well as their counsel. The Court assisted the parties during some of these negotiating sessions to aid the settlement process and to urge the parties to avoid expending extensive resources on a lengthy trial if at all possible.

As a courtesy to the Court, the parties have reviewed with the Court the terms of the settlement agreement between the Zimmer owners and General Electric.

We have reviewed the settlement agreement of the parties and find it fair and reasonable for the following reasons:

1. The summary jury trial process generally provided the parties with a full and fair opportunity to present the essential evidence supporting their respective claims and defenses. We consider the summary jury trial to be a good predictor of the outcome of a full trial, even in a complex case like this one. Because of the unusual length of the summary trial in this case, the parties had ample opportunity to explain their positions to the jury and to engage in spirited rebuttal.

2. As a result of the summary jury trial, the Court has itself had an opportunity to hear the parties' cases and to evaluate the jury's verdict. The summary jury's verdict was supported by the evidence.

3. The parties have recognized, however, that there is always a degree of uncertainty at a trial, specifically one involving technical matters and events which occurred over a long period of time. Given the jury's verdict, the plaintiffs were justified in agreeing to the terms stated in the settlement agreement. Given the inherent risks of any trial, General Electric was justified in avoiding, through the settlement agreements, the expense and burden of a lengthy trial dealing with difficult and technical subject matter.

For the foregoing reasons, we conclude that the settlement agreement negotiated by the parties reflects fair and reasonable resolutions of the issues raised by the second amended complaint and the counterclaims.

Accordingly, the Court having been advised by the parties that the above action has been settled, it is Ordered that the amended complaints and counterclaims are hereby dismissed with prejudice, provided that any of the parties may, upon good cause shown, within sixty days, reopen this action if settlement is not consummated.

SO ORDERED.

/s/ S. ARTHUR SPIEGEL
United States District Judge

INTERROGATORIES

Plaintiffs' Breach of Contract Claim Against General Electric

1. Do you find that defendant General Electric breached its contract with plaintiffs, the elements for which are set forth on page 11 of the instructions?

   Yes [ ] No [✓]

2. If your answer to question 1 is "yes," answer the following questions for the purpose of determining the applicable statute of limitations in this case. The contract between plaintiffs and defendant General Electric had two components—the sale of equipment by General Electric to plaintiffs and the provision of services by General Electric to plaintiffs. You are asked to determine which component was the predominant factor in the contract.

   2a. Do you find the predominant factor to be the sale of equipment?

   Yes [ ] No [ ]

   2b. Do you find the predominant factor to be the provision of services?

   Yes [ ] No [ ]

3. With regard to the equipment provided for by the contract, do you find that it was moveable at the time of its identification to the contract?

   Yes [ ] No [ ]

4. If your answer to question 1 is "yes," what amount of money do you award to plaintiffs against General Electric for any loss that resulted from the breach? (If you answered "yes" to *both* questions 2a *and* 3, then you may only award damages for any breach that occurred after July 10, 1980.)

$ _____

Plaintiffs' Fraud Claim Against General Electric

1. Do you find that defendant General Electric committed fraud against plaintiffs, the elements of which are contained in instructions on page 16?

Yes [ ] No [✓]

2. If your answer to question 1 is "yes," you must determine when plaintiffs knew or should have known of the fraud, for purposes of establishing the relevant statute of limitations for this claim.

2a. Do you find that plaintiffs knew or should have known of the fraud before February 11, 1982?

Yes [ ] No [ ]

2b. Do you find that plaintiffs knew or should have known of the fraud only after February 11, 1982?

Yes [ ] No [ ]

3. If your answer to question 1 is "yes" and your answer to question 2b is "yes," how much, if anything, do you award against General Electric to plaintiffs for damages proximately caused by General Electric's fraud?

   $ _____

4. If you awarded damages in question 3, you may consider whether an award of punitive damages is appropriate.

   4a. Do you find that General Electric's conduct toward plaintiffs was malicious, wanton, or oppressive?

   Yes [ ] No [ ]

5. If your answer to question 4 was "yes," what amount of punitive damages do you award?

   $ _____

Plaintiffs' RICO Claims Against General Electric

The following questions relate to plaintiffs' claims that General Electric violated § 1962(b) of Title 18 of the United States Code. See pages 30-38 of the instructions for the elements of this claim.

1. Do you find that an "enterprise" existed?

   Yes [✓] No [ ]

2. Do you find that the enterprise "affected interstate commerce"?

   Yes [✓] No [ ]

3. Do you find that General Electric "acquired or maintained an interest in or control of" the enterprise?

   Yes [ ] No [✓]

4. Do you find that General Electric committed "acts of racketeering activity," *i.e.*, that you *either* find that General Electric knowingly participated in a scheme to defraud plaintiffs, or that General Electric violated the mail or wire fraud statutes?

   Yes [ ] No [✓]

5. Do you find that General Electric engaged in a "pattern" of racketeering activity?

   Yes [ ] No [✓]

6. Do you find that plaintiffs were injured in their business or property by reason of General Electric's violation of this portion of the RICO statute?

   Yes [ ] No [✓]

7. Regardless of your answers to questions 1 through 6, you are asked to determine when plaintiffs knew or should have known of the fraud that is the basis of their RICO claim, for purposes of establishing the relevant statute of limitations.

   7a. Do you find that plaintiff knew or should have known of the fraud before February 11, 1982?

   Yes [✓] No [ ]

7b. Do you find that plaintiffs knew or should have known of the fraud only after February 11, 1982?

Yes [ ] No [✓]

8. If your answers to the first six questions are "yes," and you answered question 7b "yes," how much, if anything, do you award to plaintiffs against General Electric for its violation of § 1962(b)?

$_____

The following questions relate to plaintiffs' claim that General Electric violated § 1962(c) of Title 18 of the United States Code. See pages 39-41 for the elements of this claim.

1. Do you find that an "enterprise" existed?

Yes [✓] No [ ]

2. Do you find that the enterprise "affected interstate commerce"?

Yes [✓] No [ ]

3. Do you find that General Electric "conducted or participated in the conduct of the affairs" of an enterprise?

Yes [ ] No [✓]

4. Do you find that General Electric committed "acts of racketeering activity," *i.e.*, that you *either* find that General Electric knowingly participated in a scheme to defraud plaintiffs, or that General Electric violated the mail or wire fraud statutes?

Yes [ ] No [✓]

5. Do you find that General Electric engaged in a "pattern" of racketeering activity?

   Yes [ ] No [✓]

6. Do you find that plaintiffs were injured in their business or property by reason of General Electric's violation of this portion of the RICO statute?

   Yes [ ] No [✓]

7. Regardless of your answers to questions 1 through 6, you are asked to determine when plaintiffs knew or should have known of the fraud that is the basis of their RICO claim, for purposes of establishing the relevant statute of limitations:

   7a. Do you find that plaintiffs knew or should have known of the fraud before February 11, 1982?

   Yes [✓] No [ ]

   7b. Do you find that plaintiffs knew or should have known of the fraud only after February 11, 1982?

   Yes [ ] No [✓]

8. If your answers to the first six questions are "yes," and you answered question 7b "yes," how much, if anything, do you award to plaintiffs against General Electric for its violation of § 1962(c)?

   $_____

Plaintiff's Breach of Contract Claim Against Sargent & Lundy

1. Do you find that Sargent & Lundy breached its contract with plaintiffs, the elements of which are set forth at page 42 of the instructions?

   Yes [ ] No [✓]

2. If your answer to question 1 is "yes," how much, if anything, do you award against Sargent & Lundy to plaintiffs for damages as a result of Sargent & Lundy's breach of contract?

   $_____

3. If you awarded damages in any amount in question 2, please indicate what portion of the award represents each of the following:

   a. Research, testing and redesign $_____
   b. Repair and construction $_____
   c. Plant-wide costs or overheads $_____
   d. Financing $_____

4. On Sargent & Lundy's counterclaim, do you find that plaintiffs breached their contract with Sargent & Lundy?

   Yes [✓] No [ ]

Supreme Court, U.S.
FILED
JAN 17 1989
JOSEPH F. SPANIOL
CLERK

No. 88-813

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE CINCINNATI POST, a division of SCRIPPS HOWARD, INC., *et al.*, PETITIONERS

v.

GENERAL ELECTRIC COMPANY, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether petitioners have a right of access under the First Amendment to the "summary jury trial" voluntarily agreed to by the parties as part of the settlement proceedings in this private civil case.

RULE 28.1 STATEMENT

Respondent General Electric Company has the following subsidiaries (other than wholly-owned subsidiaries) and affiliates, not including subsidiaries whose shares or debt securities are not publicly held: General Electric Credit Corporation; General Electric Credit International, N.V.; Canadian General Electric Company, Ltd.; General Electric Overseas Capital Corporation; and RCA Corporation.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-813

THE CINCINNATI POST, a division of SCRIPPS HOWARD, INC., *et al.*, PETITIONERS

v.

GENERAL ELECTRIC COMPANY, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 854 F.2d 900. Two of the orders of the district court (Pet. App. A13-A24, A25-A31) are reported at 117 F.R.D. 597. A third order of the district court (Pet. App. A32-A34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1988. The petition for a writ of certiorari was filed on November 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners contend that the court of appeals erred in holding that the public has no First Amendment right of access to the so-called "summary jury trial" —a voluntary settlement device "intended for hard-core cases that defy settlement and appear destined for trial." Lambros, *Summary Jury Trials*, 13 Litigation 52 (Fall 1986). The governing legal standards are well established in this Court's jurisprudence, and the court of appeals correctly applied those standards. Settlement proceedings have always been conducted in private, under conditions designed to preserve the confidentiality of the disclosure and to enhance the candor and viability of the settlement process. They have never taken place in a fishbowl, and their efficacy would be impaired by any requirement that they occur in public. Petitioners offer no reasoned basis for treating "summary jury trials" any differently from other types of settlement proceedings or for reviewing at this juncture what is an issue of first impression in the courts of appeals.

1. *The Underlying Litigation.* This case arises out of a lawsuit involving the design and construction of the William H. Zimmer Nuclear Power Plant (the Zimmer plant) in Ohio. The plaintiffs below were three Ohio electric utilities (the Zimmer owners) that undertook jointly in 1968 to build the Zimmer plant. The defendants were Sargent & Lundy (S&L), retained in 1968 to furnish architectural and engineering services for the Zimmer plant; S&L's individual partners; and General Electric Company (GE), which in 1969 was awarded the contract to supply the nuclear steam supply system (NSSS) for the plant.

In the mid-1970s, when the Zimmer plant was nearing completion, questions were raised about possible dynamic forces within the containment surrounding the NSSS resulting from the discharge of steam into water. Accordingly, the Zimmer owners, in concert with owners of similar plants and with the assistance of GE and S&L, analyzed these "hydrodynamic loads" and subsequently redesigned and physically modified portions of the Zimmer plant in order to meet requirements imposed by the Nuclear Regulatory Commission. These modifications (and similar ones made at other plants) were completed by the early 1980s and satisfied the NRC's requirements for hydrodynamic loads. In January 1984, for reasons unrelated to hydrodynamic loads, the Zimmer plant's owners decided to convert it to a coal-fired plant.

The Zimmer owners filed the underlying lawsuit in the United States District Court for the Southern District of Ohio in July 1984, alleging that GE and S&L had breached contractual and common law duties and therefore were liable for the costs of modifying the Zimmer plant. The Zimmer owners later amended their complaint against GE to add fraud and RICO counts. Although petitioners suggest that there was great public interest in this case because it involved an allegedly "unsafe nuclear power system" (Pet. 19), the fact is that the Zimmer plant had been abandoned as a nuclear project before the lawsuit was filed, and any problem with hydrodynamic loads had been resolved several years earlier. Thus, at the time the case reached the "summary jury trial" stage, the suit was solely a commercial dispute concerning who would have to pay for changes made to the plant.

2. *The Settlement Process In This Case.* In an apparent effort to enhance their claim that "summary jury trials" are more akin to ordinary civil trials than to settlement proceedings, petitioners offer a generic description of summary jury trials that differs in several respects from the manner in which the summary jury trial in *this* case was actually conducted. See Pet. 4-8. Thus, even if some summary jury trials might take place under court compulsion, or might lead to an actual adjudication because the parties agree to accept the mock jury's "verdict," that did not happen here. This case is about a particular summary jury trial proceeding that took place voluntarily, was designed solely to assist the parties in discussing a settlement, and was conditioned on express assurances of confidentiality. We refer the Court to the court of appeals' opinion (Pet. App. A8-A9), which accurately describes both the general nature of summary jury trials and the particular manner in which the summary jury trial in this case was conducted.

a. During the course of the pretrial proceedings in this case, the district court made several attempts, all unsuccessful, to induce the parties to reach a settlement. As the trial date approached, the district court made a final effort to spur settlement by resort to the "summary jury trial." In February 1987, the court mentioned the possibility of holding a summary jury trial in September 1987, and on June 26, 1987, the court detailed the procedures that would be followed at the summary proceeding. In keeping with the nature of the proceeding as a voluntary settlement device, the court provided that:

- the parties would be represented at the summary jury trial by their chief executive officers,

"with immediate access to the corporate decision-making mechanism";

- neither the mock jury's findings nor statements of counsel or any party would be admissible as evidence should the case proceed to trial;
- unless the parties desired to arrange for a court reporter, "the proceedings will not be recorded" and "all results thereof, shall be confidential, and shall not be disclosed other than to the parties, their attorneys, consultants and insurers"; and
- the mock jurors "shall be appropriately instructed as to such confidential treatment."

Shortly thereafter, GE raised objections to participating in the summary jury trial. Although GE agreed that "every effort should be made to settle this case prior to trial through both conventional and extraordinary means," it was concerned that the danger of "highly distorted prejudicial publicity" would "inevitably harm one or more of the parties to this litigation." GE Mem. in Support of Mot. to Vacate, July 1, 1987, at 1-2. GE recognized that an actual trial would take place in public, but such a proceeding would entail a complete presentation of each side's case, with cross-examination of witnesses and the opportunity to put documents in context. By contrast, "the disclosure of fragmentary information" during a summary jury trial would give a distorted picture of the case, and the real trial might be adversely affected if the results of the summary jury trial became known. *Id.* at 2-3.

Although the district court still wanted to proceed with the summary jury trial, it recognized the legiti-

macy of GE's concerns. Accordingly, the court stated that it would "use every effort to maintain the confidentiality of the results of the summary jury trial including imposition of sanctions, if appropriate, if the outcome is improperly disclosed." R. 579 (Order Denying Mot. to Vacate, Aug. 10, 1987, at 2-3). Based on these assurances of confidentiality, GE agreed to take part in the summary jury trial proceedings.[1]

b. As noted above, the district court's order of June 26, 1987, set this case for confidential summary jury trial on September 8, 1987. Although petitioners were thus on notice for more than two months that the summary jury trial would commence on September 8 and that it would not be open to the public, they waited until September 4—the Friday before Labor Day and the last business day prior to the start of the summary proceeding—to file a motion to intervene under Fed. R. Civ. P. 24(b) for the purpose of making a First Amendment demand for access to the proceeding.

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[1] Because the district court's June 26 order contained a provision for confidentiality, petitioners argue (Pet. 9 n.5) that GE's participation in the summary jury trial was effectively compelled because "[t]he district court took no additional steps to accommodate GE when the court denied GE's motion to vacate." In fact, however, the district court's August 10 order strengthened the confidentiality provision in the June 26 order by emphasizing the court's commitment to the preservation of confidentiality, backed up by its willingness to impose sanctions for improper disclosure. Moreover, the district court expressly stated that it conducted the summary jury trial with GE's cooperation and that it closed the summary jury trial in response to GE's concerns (Pet. App. A20). The court of appeals correctly concluded, therefore, that the district court did not compel GE to participate in the summary jury trial. See *id.* at A4 n.2, A9 n.5.

Confronted with petitioners' eleventh-hour motion to intervene, and unwilling to postpone the long-scheduled summary jury trial, the district court ordered the motion briefed on an expedited basis during the first several days of the summary trial. It also requested that the parties arrange for a transcript of the proceedings to be preserved in the event that petitioners ultimately prevailed in their claim of a right of access to the summary jury trial. See Pet. App. A15.

On September 14, 1987, the district court denied petitioners' motion to intervene, holding that they had no right to attend the summary jury trial. The court observed that "[t]he summary jury trial, for all it may appear like a trial, is a settlement technique. It was designed as such and was so presented by the Court to the parties in this case." Pet. App. A20. Applying the two-part test established by this Court in *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), the district court held that the press had no First Amendment right of access because (1) there is no tradition of access to summary jury trials or to other recognized settlement devices, which "are in a class of proceedings that have been closed to the public to best effectuate their purposes"; and (2) public access "does not 'play a particularly significant positive role' " in the functioning of the summary jury trial because "the proceeding is non-binding and has no effect on the merits of the case, other than to promote settlement." *Id.* at A24 (citation omitted).

The district court was unpersuaded by petitioners' claim that they had a substantial interest in "hear-[ing] the arguments of each side as they relate to an issue of paramount public concern." Pet. App.

A21. The court remarked that, "[w]hile this may be true, [the inability to hear these arguments] will always follow in a case that settles prior to trial on the merits. Thus, should this case settle, either pursuant to more traditional settlement techniques or the summary jury trial, the public would be precluded from hearing the actual evidence in the case." *Ibid.*[2]

Following the denial of petitioners' motion to intervene, the summary jury trial continued as scheduled. Both sides set forth their evidence in abbreviated fashion—as much for the benefit of the parties' executive officers in attendance as for the mock jury. Indeed, the district court repeatedly urged the parties to engage in settlement negotiations and met personally with their chief executive officers to discuss settlement during the course of the summary jury trial. The summary proceeding concluded on September 21, 1987, when the mock jury announced its "verdict" as to liability and damages.

c. The summary jury trial in this case had its intended effect. Settlement negotiations began dur-

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[2] On October 5, 1987, the district court amended its September 14 order (1) to incorporate an oral ruling issued on September 21, 1987, restricting communications between the mock jurors and the press and public until the case had ended, and (2) to add a provision requiring that "the list identifying prospective jurors on the panel for the summary jury trial, as well as those who actually served on the panel for the summary jury trial, shall remain sealed until the conclusion of this litigation." The court explained that "[t]o disclose [the mock jurors'] identities at this time may defeat the confidentiality of the jury's decision and would be inconsistent with our Order closing the proceedings to the public." Pet. App. A27.

ing the course of the summary jury trial. After hearing presentations of each side's case, and after receiving the mock jury's assessment of that evidence, the parties entered into a settlement of the underlying litigation. Although the district court was not required to approve the terms of the settlement in this private civil suit, the parties submitted the settlement "[a]s a courtesy to the Court." Pet. App. A33. The district court announced that it had "reviewed the settlement agreement of the parties and f[ou]nd it fair and reasonable." *Ibid.* The court then entered an order dismissing the case with prejudice. *Id.* at A34.

In addition to addressing the substantive terms and conditions of the settlement, the settlement agreement dealt with the confidentiality of the statements made and documents introduced in the summary jury trial, much of which had been subject to a comprehensive protective order negotiated by the parties and approved by the magistrate in December 1984. The parties stipulated that, with the exception of the mock verdict on the issue of liability (which was unanimously in favor of GE on all counts), the summary jury trial proceedings would continue to be subject to the restrictions on disclosure provided in the district court's previous orders. Stipulation of Nov. 20, 1987, at 2, ¶ 5. Furthermore, the parties stipulated that, subject to the district court's approval, "[t]he Order of the Court dated October 5, 1987, be amended to extend until further order of Court the period during which communication with members of the summary jury is restricted and the jury list is sealed." *Id.* at ¶ 7. All parties thus understood that, by settling this case, they were en-

suring the continued confidentiality of the summary jury trial proceedings.[3]

3. *The Court of Appeals' Decision.* The court of appeals affirmed the district court's ruling that petitioners have no First Amendment right of access to the summary jury trial. Pet. App. A1-A12. Like the district court, the court of appeals analyzed petitioners' claimed right of access under the two-part test of *Press-Enterprise II.*

The court of appeals first endorsed the district court's ruling that " 'there is no historically recognized right of access to summary jury trials' " (Pet. App. A7) (quoting *id.* at A17)). The court below observed that "[t]he summary jury trial is a device that is designed to settle disputes" (*id.* at A7-A8 (footnote omitted)) and that " 'there is general agreement that historically settlement techniques are closed procedures, rather than open.' " *Id.* at A8 (quoting *id* at A18).

The court of appeals also rejected petitioners' claim that summary jury trials are more akin to ordinary civil trials than to settlement mechanisms. As the

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[3] Continued confidentiality was particularly important because of the pendency of other cases raising similar claims against GE. See *Nebraska Pub. Power Dist.* v. *General Electric Co.*, No. 88-L-27 (D. Neb. filed Jan. 8, 1987); *Washington Public Power Suply System* v. *General Electric Co.*, No. C-85-098-AAM (E.D. Wash. filed Jan. 28, 1985). Although the plaintiffs in those cases had access to the depositions in this case, they did not have access to GE's trial strategy, demonstrative exhibits, and other materials that were disclosed at the summary jury trial. We note that an additional case raising these claims has recently been filed. *Long Island Lighting Co.* v. *General Electric Co.*, No. CV-88-2716 (LDW) (E.D.N.Y. filed Feb. 2, 1988).

court explained, there are "manifold" differences between the summary jury trial and a real trial (Pet. App. A8-A9) (citations omitted)):

> In a summary jury proceeding, attorneys present abbreviated arguments to jurors who render an informal verdict that guides settlement of the case. * * * Following short opening statements, all evidence is presented in the form of a descriptive summary to the mock jury through the parties' attorneys. Live witnesses do not testify, and evidentiary objections are discouraged. Thus, some of the evidence disclosed to the mock jury might be inadmissible at a real trial.
>
> Following counsels' presentations, the jury is given an abbreviated charge * * *. To emphasize the purely settlement function of the exercise, the mock jury is often asked to assess damages even if it finds no liability. Also, the court and jurors join the attorneys and parties after the "verdict" is returned in an informal discussion of the strengths and weaknesses of each side's case.

Thus, the court of appeals concluded that "[a]t every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference." *Id.* at A9.

The court of appeals next rejected petitioners' contention that public access would " 'play[] a significant positive role in the functioning' " of the summary jury trial. Pet. App. A9 (quoting *Press-Enterprise II*, 478 U.S. at 8). On the contrary, the court concluded that public access would seriously hamper the efficacy of the summary jury trial (Pet. App. A10):

> [W]here a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement. Thus, public access to summary jury trials over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device. Therefore, allowing access would undermine the substantial governmental interest in promoting settlements * * *.[4]

Finally, the court of appeals stressed the nonbinding nature of summary jury trials. Distinguishing the preliminary hearing considered by this Court in *Press-Enterprise II*, the court explained that "[s]ummary jury trials do not present any matters for adjudication by the court." Pet. App. A11 (footnote omitted). "Thus, it is the presence of the exercise of a court's coercive powers that is the touchstone of the recognized right to access, not the presence of a procedure that might lead the parties to voluntarily terminate the litigation." *Ibid.*[5]

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[4] The court of appeals also dismissed petitioners' claim of a public "right to know" about what occurred at the summary jury trial. The court of appeals recognized, as had the district court, that the public has no First Amendment right to observe any negotiations leading to a traditional setlement of the case, and the parties have no constitutional obligation to reveal the content of the negotiations. The court saw no reason to reach a different result in the context of the summary jury trial. Pet. App. A11.

[5] Judge Edwards concurred in the majority's holding that petitioners have no First Amendment right of access to the summary jury trial itself, but did "not agree that the record can appropriately continue to be sealed after a settlement has been effected." Pet. App. A12.

ARGUMENT

The court of appeals correctly held that petitioners have no First Amendment right of access to the summary jury trial in this private civil case. This decision, which resolves an issue of first impression, does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Before turning to petitioners' legal arguments, we note that there are a number of prudential reasons that support denial of the petition in this case. First, petitioners do not even suggest that there is a difference of opinion, much less a conflict, among the lower courts with respect to either of the questions they purport to present. Petitioners do not allege that any court has ever held that settlement proceedings—whether the "summary jury trial" in this case or some other form of non-adjudicatory dispute resolution mechanism—must be opened to the public under the First Amendment.

Second, the principal question that petitioners ask this Court to review rarely arises in practice. Indeed, petitioners have not cited a single other instance in which the press or public has sought access to a summary jury trial. Thus, there has been no occasion for the lower federal courts to consider whether, if the parties have a legitimate interest in maintaining the confidentiality of the summary jury trial, the proceeding should be closed. If the question of public access to summary jury trials ever arises again, there will be time enough for this Court to consider the issue with the benefit of the views of other lower federal courts.

Finally, contrary to petitioners' contention (Pet. I (Question 1); Pet. 13 & n.10), there is no occasion in this case to consider the broad question whether a First Amendment right of access applies to adjudicatory hearings in civil cases. GE argued below not that the First Amendment is inapplicable to all court proceedings in civil litigation, but that any supposed right of access does not extend to settlement discussions and mechanisms, even if a judge and "mock jury" participate in that process. The court of appeals in turn analyzed petitioners' claim under the same test that this Court has fashioned in the criminal context, where a right of access is recognized. Since the court below nonetheless rejected petitioners' claim, despite giving them the benefit of this more favorable test, this is hardly the case in which "to resolve the important issue of whether [a right of access] applies in civil cases" (Pet. 13).

2. Turning to the merits, it is telling that petitioners studiously avoid even mentioning the two-part *Press-Enterprise II* test under which the courts below correctly analyzed the claimed right of access in this case. Indeed, petitioners fail to offer *any* analytic framework under which right-of-access claims should be considered; instead, they advance only the argument that public confidence in the judicial system would somehow be enhanced if petitioners were granted access to summary jury trials. That conclusory generalization, however, ignores the essential nature of the summary jury trial as a settlement device.[6] As the courts below properly concluded, peti-

[6] It bears repeating that the summary jury trial, if successful, leads only to voluntary settlement by the parties; thus, public access is wholly unnecessary to promote public confi-

tioners have no First Amendment right to be admitted to a court-sponsored settlement process that (1) is totally lacking in any tradition of public access, (2) does not adjudicate anyone's rights, and (3) would be seriously impaired if it had to be opened to the public.

a. There is of course no historically recognized right of access to settlement proceedings. Rather, they almost always are conducted in private, and the terms of the settlements themselves are usually confidential. See, *e.g.*, *Palmieri* v. *New York*, 779 F.2d 861, 865 (2d Cir. 1985) (" '[s]ecrecy of settlement terms * * * is a well-established American litigation practice' " (citation omitted)); *Minneapolis Star & Tribune Co.* v. *Schumacher*, 392 N.W.2d 197, 204 (Minn. 1986). Indeed, settlements often could not be reached without confidentiality. See, *e.g.*, *id.* at 205; *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. 468, 470, 472 (E.D.N.Y. 1981) (Weinstein, J.), *aff'd*, 677 F.2d 230 (2d Cir. 1982). And the desire to maintain confidentiality is frequently a motivating factor in achieving a settlement. See, *e.g.*, *Schumacher*, 392 N.W.2d at 205 ("[o]ne of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public").

Cognizant of both the public interest in fostering settlements and the nature of the settlement process, the law has long accorded special protections to settlement discussions and agreements in order to en-

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dence in the judicial system. Fairness is assured, as with other commercial contracts, by the fact that the settlement is the product of arms' length bargaining by fully represented parties.

courage the voluntary resolution of disputes. Courts have explicitly rejected claims for access to the fruits of settlement proceedings or to the materials or documents relied upon by the parties while engaged in the settlement process. See, *e.g.*, *Schumacher*, 392 N.W.2d at 205 (applying *Press-Enterprise II* analysis to find no right of access to settlement documents in private civil litigation, even where documents were part of court record); *In re Franklin Nat'l Bank*, 92 F.R.D. at 470 (access to sealed documents refused because their continued confidentiality was vital component of settlement agreement). See also Fed. R. Evid. 408 and Advisory Committee Notes; Fed. R. Civ. P. 16 (c)(7) and 1983 Advisory Committee Notes; Fed. R. Civ. P. 68. Thus, the complete absence of any tradition of public or press access to settlement proceedings, whether they be the modern-day summary jury trial or a more traditional in-chambers settlement conference, requires the rejection of petitioners' claim of a right of access to the summary jury trial in this case.

b. Nor do petitioners fare any better under the second prong of the *Press-Enterprise II* analysis. This Court has recognized that some proceedings would be "totally frustrated if conducted openly" (*Press-Enterprise II*, 478 U.S. at 9). See, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 684 (1972) (grand jury and other proceedings). That is the case with the summary jury trial. Not only would public access not play a significant positive role in the functioning of the summary jury trial, it would actually be detrimental to the process and impair its utility as a settlement device.

Where, as here, a party has a legitimate interest in confidentiality, a requirement of public access

would in all likelihood result in there being no summary jury trial at all. As the Seventh Circuit recently held, a federal district court cannot compel a party to participate in a summary jury trial. *Strandell* v. *Jackson County*, 838 F.2d 884 (7th Cir. 1987). Indeed, the summary jury trial in this case was conducted only with the consent of the parties. See Pet. App. A4 n.2, A9 n.5. Accordingly, a party strongly valuing confidentiality would simply not agree to a proceeding that is open to the public; the result would be not an increase in the public's knowledge but an abandonment of a useful and important technique for resolving disputes without trials and appeals. See *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 472-473 & n.12 (1984); *Upjohn Co.* v. *United States*, 449 U.S. 383, 395 (1981).

Even if courts had the power to compel involuntary participation in a summary jury trial, many judges undoubtedly would be reluctant to do so at the expense of a party's legitimate interest in confidentiality. Most judges would realize that it is a high price to exact, in the hopes of settling a case, to require a party to disclose confidential business information, or to damage its position in other pending or potential suits by premature revelation of its trial strategy, or to subject itself to public misunderstanding and even financial injury based on an incomplete evidentiary record—typically, the unsworn "summaries" tendered by opposing counsel.

The likeliest outcome in such circumstances is that the parties would resort to other procedures designed to resolve disputes without a trial, such as court-annexed arbitration or "mini-trials" before a neutral observer selected by the parties. See Lieberman &

Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 427-428 (1986); *Annual Judicial Conference of the Second Judicial Circuit of the United States*, 101 F.R.D. 161, 222, 223, 233 (1983). These techniques—similar to but less effective than the summary jury trial—are private processes from which the press and the public unquestionably may be excluded.

Even if the summary jury trial is held, the loss of confidentiality would limit its utility as a settlement device. The fishbowl atmosphere may cause public relations concerns to dominate settlement objectives, altering the character of the presentation in ways that are difficult to predict. A party, in order to maintain the secrecy of its trial strategy or sensitive business information, may in good faith pursue an approach at the summary jury trial that is different from the one it plans to take at the actual trial. Public access would therefore give impetus to the tendency to divorce the presentation at the summary jury trial from that at the actual trial and thus, by reducing its predictive value, diminish the effectiveness of the summary jury trial as a settlement device.

Finally, even if the conduct of the summary jury trial itself remained unaltered, public disclosure of its outcome could affirmatively impair the prospects for settlement of the litigation. Especially in controversial cases or cases of substantial monetary importance, public knowledge of the outcome of the summary trial might actually harden the positions of the parties. Such a consequence of public access hardly furthers the salutary purpose of the summary jury trial.

Against these disadvantages, any claim that petitioners' presence would play "a significant positive

role" in the functioning of the summary jury trial—a claim that petitioners, in their desire to avoid coming to grips with *Press-Enterprise II*, do not even make—would be untenable. To the contrary, recognition of a right of public access would reduce the utility of this settlement technique while producing little or no gain in public information about the judicial process. The First Amendment does not require such a perverse result.[7]

2. While ignoring the analytic framework established in *Press-Enterprise II*, petitioners make the wholly unsupported allegation (Pet. 16-17) that summary jury trials are akin to proceedings in which this Court has upheld a public right of access because they "play a similarly decisive role in civil litigation." *Id.* at 16. Petitioners are plainly wrong. In each instance in which this Court has found that tradition supports a First Amendment right of access, the proceeding at issue has resulted in a binding judicial determination that directly affected the rights of the parties. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (trial); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982)

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[7] Petitioners also intimate (Pet. 19) that their right to attend the summary jury trial in this case somehow derives from the public importance of the issues in the underlying lawsuit between GE and the Zimmer owners. It is well settled, however, that the First Amendment right of access is not a right to know the details of any particular private dispute, but a right of the public, within the confines of the *Press-Enterprise II* test, to learn about the workings of the judicial process. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606 (1982); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1337 n.9 (D.C. Cir. 1985) (Scalia, J.) ("the public interest in obtaining news is [not] the focus of the inquiry in right-of-access cases").

(trial); *Press-Enterprise Co.* v. *Superior Court* (*Press-Enterprise I*), 464 U.S. 501 (1984) (jury voir dire); *Press-Enterprise II* (probable cause preliminary hearing).

In contrast, the summary jury trial does not present any matter for adjudication by the court. Settlement proceedings, even if conducted under judicial auspices, are designed to avoid entirely the need for invoking the adjudicatory powers of the courts; *nothing that happens during settlement proceedings, including a summary jury trial, can affect a party's legal rights without its consent.* Here, for example, the district court established rules for the summary jury trial guaranteeing that the proceeding would have no adjudicative or coercive effect on the parties. See page 5, *supra*. And, as with a judge's preliminary assessment of the evidence at a settlement conference, no enforceable rights arose out of the mock jury's verdict. These crucial factors make this case totally unlike any of the prior cases in which a First Amendment right of access has been recognized.

Petitioners nevertheless argue that the summary jury trial is like a traditional judicial "adjudication" because the parties are compelled to attend the proceeding, the parties may stipulate to be bound by the mock jury's verdict, and, in this case, the district court formally approved the parties' settlement stipulation. None of these factors transforms the summary jury trial into an adjudicative proceeding.

First, petitioners' assertion (Pet. 7) that the parties may be compelled to participate in a summary jury trial misstates the law and ignores what occurred in this case. See page 17, *supra*. In any

event, even if petitioners were correct that a court may compel parties to participate in this—or any—type of settlement mechanism, the court's triggering role would not create a First Amendment right of access to the ensuing presentations. For example, parties are obligated by the Federal Rules of Civil Procedure to participate in discovery, but this Court held in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), that there is no First Amendment right of access to discovery materials. Similarly, parties may be compelled to participate in traditional in-chambers settlement conferences, yet it would be ludicrous to suggest that the public has a right to demand access to those proceedings.

Second, petitioners' reliance (Pet. 4-5) on the parties' ability to stipulate to be bound by the mock jury's verdict is wholly unwarranted. No such stipulation was ever entered in this case, so petitioners' argument was a red herring even when it was first advanced in the district court. But the argument was rendered completely frivolous by the elimination, at the district court's suggestion (Pet. 10-11), of the provision in question.

Finally, the summary jury trial cannot be characterized as an adjudicative proceeding simply because the parties subsequently entered into a settlement that was approved by the district court. See Pet. 12, 17. In ordinary civil litigation between private parties, settlement is solely in the hands of the litigants; here, too, the district court played only a traditional settlement role. The court's approval of the settlement was not required by statute or rule. See, *e.g.*, *United States* v. *City of Miami*, 614 F.2d 1322, 1330 & n.16 (5th Cir. 1980), modified on reh'g, 664 F.2d

435 (1981). And it goes without saying that the public's right of access cannot be made to depend upon events that may or may not occur after the summary jury trial has ended.

3. With great flourishes of hyperbole, petitioners make much of the plainly unremarkable fact that the courts below recognized the practical necessity of restricting communications between the mock jurors and the press and public. See, *e.g.*, Pet. 3, 13. Petitioners' arguments are unavailing, for the restrictions simply preserve the legitimate confidentiality of the summary jury trial that, as demonstrated above, is fully consistent with the First Amendment. As the district court recognized, disclosure of the identity of the mock jurors would totally undermine the basis and purpose of the original order closing the summary jury trial. Pet. App. A27.

Petitioners' argument that they are entitled to interview the mock jurors completely ignores the special nature of a non-public summary jury trial. Petitioners' reliance on the "'public character of [jury] proceedings'" (Pet. 18 n.12 (quoting *Press-Enterprise I*, 464 U.S. at 506)) erroneously presupposes that this was actually a jury trial in which the "veniremen" were performing their fact-finding function under the Seventh Amendment. Here, however, the restrictions on juror communication were imposed for the sole purpose of maintaining the confidentiality of a *closed* proceeding that was specifically structured to aid the parties in assessing possible settlement alternatives. Once it has been determined that this type of settlement mechanism may lawfully be closed to the public, the restriction on communications between the mock jurors and the

press flows naturally from the need to preserve that legitimate confidentiality.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioners also uncritically—and incorrectly—assume (Pet. 18 n.12) that their asserted right to obtain information from the mock jurors is fundamental to the protections of the First Amendment. However, even with respect to actual trials, courts have noted "the tenuous nature of the first amendment interest articulated on behalf of the press with regard to an order restraining, not the press, but trial participants." *Radio & Television News Ass'n* v. *United States District Court*, 781 F.2d 1443, 1445 (9th Cir. 1986). A "first amendment right of full access to trial participants * * * is not supported by constitutional case law," and "the media's collateral interest in interviewing trial participants is outside the scope of protection offered by the first amendment" (*id.* at 1446, 1447). Moreover, "[f]ederal courts have generally disfavored post-verdict interviewing of jurors." *Haeberle* v. *Texas Int'l Airlines*, 739 F.2d 1019, 1021 (5th Cir. 1984). These considerations are even more applicable in the case of "mock jurors" at a "summary jury trial."